The Law Commission

CIVIL LIABILITY FOR ANIMALS

Laid before Parliament by the Lord High Chancellor pursuant to section 3(2) of the Law Commissions Act 1965

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Commissioners are—

The Honourable Mr. Justice Scarman, O.B.E., *Chairman.*
Mr. L. C. B. Gower, M.B.E.
Mr. Neil Lawson, Q.C.
Mr. N. S. Marsh, Q.C.
Mr. Andrew Martin, Q.C.

Mr. Arthur Stapleton Cotton is a special consultant to the Commission. The Secretary of the Commission is Mr. H. Boggis-Rolfe, C.B.E., and its offices are at Lacon House, Theobald's Road, London, W.C.1.

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LAW COMMISSION

Item V of the First Programme

CIVIL LIABILITY FOR ANIMALS

To the Right Honourable the Lord Gardiner,
the Lord High Chancellor of Great Britain

A. INTRODUCTION

1. Item V of the Commission's First Programme reads as follows:

"CIVIL LIABILITY FOR ANIMALS

It is widely recognised that this branch of the law is in an unsatisfactory state and that it continues to apply rules and draw distinctions which make little sense in modern conditions.

Following the Report of the Committee on the Law of Civil Liability for Damage done by Animals,[1] the Goddard Committee, there has been repeated public discussion of the matter, but none of the proposals of the Committee has yet been implemented.

Realising that reform in this field is controversial, the Commission nevertheless takes the view that modernisation and simplification are necessary.

Recommended: that in the light of the Goddard Report the law as to civil liability for damage done by animals be examined.

Examining agency: the Commission.".

2. It is our practice, when considering any proposals for law reform, to consult as widely as may be appropriate, so that we may examine the subject-matter with due regard not only to its legal technicalities but also to the views of those who are principally affected by the operation of the law and to the interests of the public generally. The branch of the law here examined is of some complexity and impinges on the life of the community at many points. Apart, therefore, from consulting members of the Bar and solicitors through the Bar Council and The Law Society respectively, the Society of Public Teachers of Law, and Government Departments, we have had extended consultations with a large number of public and private organizations, representing the interests of those who keep animals either for business or pleasure, of those who are particularly liable to suffer damage by animals and of those whose responsibilities, in respect, for example, of highways or insurance, may involve the activities of animals. A list of these organizations will be found in Appendix B. We wish to acknowledge the great assistance which we have derived from all the consultations referred to in this paragraph.

[1] 1953 Cmd. 8746.

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3. Apart from the Report of the Goddard Committee, we have studied the Twelfth Report of the Law Reform Committee for Scotland[2] on the law relating to civil liability for loss, injury and damage caused by animals, bearing in mind that the laws of England and Wales and those of Scotland, as well as the factual problems with which they have to deal, have in this field many similarities. In so far as they may be relevant to conditions in this country, we have also taken account of, and at appropriate points in this Report referred to, the laws of the Commonwealth and of other countries.

B. THE GENERAL PRINCIPLES OF LIABILITY

(*a*) *Strict liability for Dangerous Animals*

4. Under the existing law (apart from liability under the Dogs Acts 1906 to 1928 and for cattle trespass, with which we deal separately below[3]) the keeper of an animal is "strictly liable", i.e., liable without proof of negligence, for injury or damage which it causes if:

(i) the animal is classified by the law as *feræ naturæ* or "wild", or

(ii) the animal, being *mansuetæ naturæ* or "tame" (i.e., not *feræ naturæ*), has a "propensity variously described in the authorities as 'vicious, mischievous or fierce' "[4] which is known to the keeper. The action which a plaintiff may bring in respect of this category of strict liability is known as a *scienter* action.

5. The preceding statement involves a considerable simplification, and in a number of respects the law is not entirely clear. It seems fairly well established that the test of whether an animal is *feræ naturæ* is whether the species to which it belongs is a danger to mankind,[5] although the references to domestication and non-domestication in *McQuaker* v. *Goddard*[6] give rise to some difficulties. In determining this question the court may have regard to experience with the animal in countries other than England; thus in *McQuaker* v. *Goddard*, in which a camel was classified as *mansuetæ naturæ*, attention was paid to experience with camels in countries where they were commonly found and used as beasts of burden. There is however no authority in the common law[7] for the existence of a category of animals which is determined by their particular danger to property, as distinguished from their danger to mankind, involving strict liability without knowledge of a vicious, mischievous or fierce propensity in the animal concerned.[8] But, although there is no direct authority on the point, statements of principle in a number of cases[9] suggest that, provided an animal is a danger to mankind, there is strict liability for any damage which it may cause to property.

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[2] 1963 Cmnd. 2185.

[3] See paragraphs 73 and 60–68 respectively below.

[4] *Per* Diplock L.J. in *Fitzgerald* v. *E. D. & A. D. Cooke Bourne* (*Farms*) *Ltd.* [1964] 1 Q.B. 249 at p. 270.

[5] See Bankes L.J. in *Buckle* v. *Holmes* [1926] 2 K.B. 125 at p. 128.

[6] [1940] 1 K.B. 687. See paragraph 15 below.

[7] Statutory offences created by the Destructive Insects Act 1877, the Destructive Insects and Pests Acts 1907, and the Destructive Imported Animals Act 1932, and orders made thereunder, do not appear to give rise to civil liability.

[8] This is regarded as an "anomaly" by Professor Glanville Williams in *Liability for Animals*, Cambridge, 1939, pp. 297–8.

[9] See *Bessazzi* v. *Harris* (1858) 1 F. & F. 92 at p. 93; *Filburn* v. *The People's Palace and Aquarium Co. Ltd.* (1890) 25 Q.B.D. 258 at p. 260; *Marlor* v. *Ball* (1900) 16 T.L.R. 239 at p. 240; *Behrens* v. *Bertram Mills Circus Ltd.* [1957] 2 Q.B. 1 at pp. 13–14.

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6. The existing law regarding strict liability for animals which are not *feræ naturæ* raises rather more points of difficulty or uncertainty. In order for the plaintiff to succeed in the *scienter* action, he must generally prove that the keeper was aware of a propensity in the animal to do the particular kind of damage of which complaint is made; but it would seem that, while a propensity to attack other animals is not sufficient to support an action in respect of an attack on a person,[10] a propensity to attack human beings may suffice in an action alleging an attack on other animals.[11] Damage arising from a dangerous condition (for example, an infectious disease) in an animal is not remediable under the *scienter* action,[12] unless the condition is conveyed by an act of the animal (for example, a bite), itself attributable to a known propensity. It would seem that the act of the animal must be in the nature of an "attack" [13] and does not therefore include behaviour which, although it may cause damage, is merely frolicsome. Further, it may now be that the propensity of the animal must be contrary to the nature of the species to which it belongs;[14] if it is in the nature, for example, of fillies to prance round strangers, then "timorous persons, unused to horses" [15] cannot on this view rely on the strict liability of their keeper if they suffer injury.

7. The strict liability which exists in respect of an animal *feræ naturæ* or under the *scienter* action has in some of the cases been said to depend on the animal escaping "from its place of incarceration or from the control of its keeper . . . the allowing of such an escape being according to modern authority the true basis of the absolute liability".[16] In *Behrens* v. *Bertram Mills Circus Ltd.*[17] Devlin J. said, "if an elephant slips or stumbles its keeper is [not] responsible for the consequences. There must be a failure of control." [18]. But Evershed L.J. in *Pearson* v. *Coleman Bros.*[19] avoided reference to "escape" or "control", stating that the defendants were obliged "to keep [the] beast so confined as to be incapable of doing damage".

8. It would also appear that strict liability for animals may be limited in its application as between master and servant. Thus in *Rands* v. *McNeil*,[20] where the farmer defendant knew that the bull which injured the plaintiff was dangerous, Jenkins L.J. said, "I do not think that this doctrine of absolute liability can reasonably be applied as between a farmer and the persons employed by him on his farm in relation to the handling by those persons of an

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[10] See *Glanville* v. *Sutton* [1928] 1 Q.B. 571.

[11] See *Jenkins* v. *Turner* (1696) 1 Ld. Raym. 109; *Gething* v. *Morgan* (1857) Saund. & M. 192.

[12] Though Bramwell B. in *Cooke* v. *Waring* (1863) 2 H. & C. 332 suggested that there was no "distinction in principle between the liability for acts of a mischievous animal and a diseased animal".

[13] See Diplock L.J. in *Fitzgerald* v. *E. D. & A. D. Cooke Bourne (Farms) Ltd.* [1964] 1 Q.B. 249 at p. 270 where he said there must be "a propensity to attack" which he distinguished from "a special propensity to cause damage". See also Willmer L.J. in the same case at p. 259.

[14] As against the authorities cited by Willmer L.J. (at p. 259) in *Fitzgerald* v. *E. D. & A. D. Cooke Bourne (Farms) Ltd.* (n. [13] above) see Diplock L.J. at p. 270 where he refers to "a domestic animal which is an exception to its species".

[15] *Per* Diplock L.J. in *Fitzgerald's* case (see n. [13] above at p. 271).

[16] *Per* Jenkins L.J. in *Rands* v. *McNeil* [1955] 1 Q.B. 253 at p. 267. See also *Murphy* v. *Zoological Society of London* [1962] C.L.Y. 68 where one of the grounds of the decision in favour of the defendants was that there had been no "escape" of the lion.

[17] See n. [9] above.

[18] At p. 19.

[19] [1948] 2 K.B. 359 at p. 380.

[20] See n. [16] above.

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animal such as a bull kept by the farmer".[21] In the same case Denning L.J. said: "This is the first case . . . where the court has had to consider the liability of a farmer towards the men whom he employs to look after a bull, or to help in looking after it. We were urged to say . . . that, in as much as the farmer knew the bull was dangerous, it was his strict duty to keep it under control so that it should do no damage . . . I do not think this is the law. The duty of the farmer to his men is not a strict duty. It is the same as the duty of any other employer. He must take reasonable care not to subject his men to unnecessary risk." [22]

9. "Strict liability"—i.e., liability without proof of negligence—for animals *feræ naturæ* or under the *scienter* action raises some points of difficulty with regard to the available defences. It is reasonably clear that contributory negligence may, to the extent that it contributed to the injury or damage, be a defence, and the fact that the plaintiff's negligence was the sole cause of the injury or damage, or that he has voluntarily assumed the risk of injury, may be complete defences. It may also be a defence if the plaintiff is shown to be a trespasser *vis-à-vis* the defendant.[23] "Act of God"—i.e., "circumstances which no human foresight can provide against, and of which human prudence is not bound to recognize the possibility" [24]—may also be a defence by analogy to its availability as a defence to strict liability for escaping dangerous things under the doctrine of *Rylands* v. *Fletcher*,[25] but this has been doubted.[26] It has been much debated whether the fact that the injury caused by a dangerous animal has been brought about by the act of a third party is a defence,[27] although a majority of the Court of Appeal in *Baker* v. *Snell*[28] and Devlin J. in *Behrens* v. *Bertram Mills Circus Ltd.*,[29] contrary to the House of Lords in a Scottish appeal,[30] were of the opinion that there was no such defence.

(b) Suggestions for the Reform of Strict Liability for Dangerous Animals

10. The foregoing necessarily brief account of the common law rules governing strict liability for animals *feræ naturæ* and under the *scienter* action may nevertheless sufficiently indicate their complex and technical nature. They have been described by Blackburn J. as "settled by authority rather than by reason".[31] It was in view of the intricacy and complexity of this branch of the law that the majority of the Goddard Committee[32] recommended the abolition of the separate categories of strict liability for animals *feræ naturæ* and under the *scienter* action; they recommended that liability for the acts of every class of animal should be based upon negligence, the action for which had in their opinion become sufficiently flexible to make these categories of strict liability unnecessary. However, Professor A. L. Goodhart in a dissenting memorandum

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[21] At p. 266.
[22] At p. 257.
[23] See Professor Glanville Williams, *op. cit.* (n. [8] above) pp. 349–352).
[24] *Per* Lord Westbury L.C. in *Tennent* v. *Earl of Glasgow* (1864) 2 M. (H.L.) 22.
[25] (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330.
[26] By Bramwell B. in *Nichols* v. *Marsland* (1875) L.R. 10 Ex. 255 at p. 260.
[27] See Beven, (1909) 22 *Harvard L.R.* 465; Pollock, (1909) 25 *L.Q.R.* 317; Goodhart, [1951] *Current Legal Problems* 177.
[28] [1908] 2 K.B. 825.
[29] See n. [9] above.
[30] *Fleeming* v. *Orr* (1857) 2 Macq. 14 in which Lord Cranworth L.C. thought the law of England and Scotland were in this respect the same.
[31] *Smith* v. *Cook* (1875) 1 Q.B.D. 79 at p. 82.
[32] See n. [1] above. The majority view is stated in paragraph 2 of the Report.

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to the Report of the Goddard Committee favoured the retention of strict liability for animals *feræ naturæ*, giving a tiger as an example, on the ground that the keeping of such animals presented a "peculiar risk" for which the creator should be responsible in all circumstances, even if there were no negligence; and he did not consider that the task of deciding which animals fell within this category was one of particular difficulty. The Law Reform Committee for Scotland in their Twelfth Report,[33] dealing with the law of Scotland which in this field appears very similar to English law, took the same view as the majority of the Goddard Committee.

11. Our consultations with members of the Bar and with solicitors show a division of opinion as to whether strict liability should be retained or liability in respect of all animals left to the general law of negligence. While the majority would appear to favour the latter, the main objection to strict liability is based not so much on principle as on the practical difficulties which have arisen in the application of the present law. The Torts Sub-Committee of the Law Reform Committee of the Society of Public Teachers of Law is also somewhat divided in its views. The majority would favour the abolition of the two distinct categories of strict liability (for animals *feræ naturæ* and under the *scienter* action), but some would put all animals on a basis of strict liability, provided that this was accompanied by a general extension of strict liability in the law of tort, while others would leave damage done by all animals to the law of negligence.

12. Only some of the other organizations which we have consulted expressed a view on strict liability for animals. The General Secretary of the Trades Union Congress, in answer to an enquiry of the Commission addressed to the Congress, has suggested that a strict liability should be imposed for damage done by all animals. The Federation of Zoological Gardens of Great Britain and Ireland, representing over sixty zoological gardens or similar institutions in England and Wales, consider that it is reasonable for keepers of dangerous animals to be strictly liable, subject to existing defences, and for this strict liability also to apply to keepers of other animals, not belonging to a dangerous species, which are in fact known to be dangerous. In substance, the view of the Federation is shared by the County Councils Association, the Country Landowners Association, the Rural District Councils Association and the Standing Joint Committee of the R.A.C., A.A. and R.S.A.C. On the other hand some bodies would retain the present strict liability for animals of a dangerous species, but abolish strict liability for animals not falling within this class but known to be dangerous, making liability for all animals not of a dangerous species depend upon negligence. This is the view of the Association of Municipal Corporations and of the Chartered Land Societies' Committee (of the Royal Institution of Chartered Surveyors, the Chartered Land Agents' Society and the Chartered Auctioneers' and Estate Agents' Institute). The Kennel Club, while not expressing a view on animals of a dangerous species, are satisfied with the existing law affecting dogs. In contrast to the foregoing views, which to a greater or lesser extent would retain some measure of strict liability, the National Farmers' Union and the National Union of Agricultural Workers would abolish all strict liability for animals, although the latter would in the action for negligence in respect of all animals depart from the usual rule and require the defendant to disprove negligence.

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[33] See n. [2] above. See paragraph 11 of the Committee's Report.

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13. Commonwealth countries and the United States, although they have in certain cases introduced by statute special forms of civil liability for animals,[34] have retained the common law categories of strict liability for animals *feræ naturæ* and under the *scienter* action. Civil law countries do not divide strict liability for animals into these two categories but commonly impose strict liability for all animals.[35]

(c) *Recommendations of the Law Commission on Strict Liability for Dangerous Animals*

14. We do not consider that it would be desirable to impose strict liability in respect of damage done by all animals. We are in fact considering the rationalization and extension of strict liability as applied to "Dangerous Things and Activities" under Item IV of our First Programme, but we think that any extension of strict liability should only be made after careful consideration of the particular risk involved. With regard to animals we see a great deal of common sense in the broad distinction which the law makes between dangerous and non-dangerous animals. It does not seem unreasonable that the keeper of a dangerous animal should bear the special risk which is created by keeping it; moreover, it is a risk against which he can more conveniently insure than can the potential victim. We agree with the Goddard Committee that the present law relating to dangerous animals is "intricate and complicated", but in our view this argues for its simplification rather than for the abandonment of its underlying principle.

15. Before setting out our recommendations four questions affecting the present law require consideration:

(i) In determining whether an animal is of a dangerous species, what weight is to be attached to experience with the species of animal outside this country? We think that the crucial question should be the danger which the species presents in the particular circumstances of this country, although a court should of course be entitled, and in some circumstances may have, to look at experience elsewhere. In our view, in *McQuaker* v. *Goddard*[36] insufficient attention was paid to the first consideration.

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[34] New Zealand, for example, by the Dogs Registration Act 1908, imposed strict liability for dogs, whether or not their keeper had knowledge of a vicious propensity, in respect of all (including human) injury, thus going beyond the English Dogs Acts 1906 to 1928, which relate only to injury to "cattle" (including horses, mules, sheep, goats and swine) and "poultry" (including domestic fowls, turkeys, geese, ducks, guinea fowls and pigeons). The English Dogs Acts are discussed in paragraph 73 below.

[35] For example, the French Civil Code, Article 1385, lays down that "the owner of an animal, or the person making use of it, while it is at his service, is responsible for the damage which the animal has caused, whether it was under his care or had strayed or escaped from it". This liability, originally considered by the courts to give rise to a rebuttable presumption of fault, has since the latter half of the nineteenth century been interpreted as imposing strict liability to which the only defences are *force majeure* or *cas fortuit* (i.e., an extraneous cause not imputable to the plaintiff or defendant), or fault of the victim. See *Responsabilité Civile*, Mazeaud-Tunc, 5th ed., vol. II, 1958, no. 1073; *Encylopédie Dalloz, Droit Civil*, vol. II, 1952 under *force majeure* (p. 833 *et seq.*). In German law a somewhat similar liability is imposed by Paragraph 833 of the Civil Code, although by an amendment to the Code of 1900, made in 1908, domestic animals used for the profession, business or maintenance of the keeper give rise to a less strict form of liability, enabling the keeper to avoid liability if he can prove either that he used requisite care or that the damage would have resulted even if he had used such care. See *Das Bürgerliche Gesetzbuch*, Commentary of the *Reichsgerichtsräte* and *Bundesrichter*, 11th ed., vol. II, Part II, 1959, under paragraph 833 (p. 1403 *et seq.*).

[36] See n. [5] above.

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(ii) Should strict liability depend on whether the species in question is in general found in a wild or in a domesticated state? We said in paragraph 5 above that the test whether an animal is *feræ naturæ* is danger to mankind. There are, however, observations in *McQuaker* v. *Goddard* which may suggest that the test is whether the animal in question has or has not been in general domesticated. Whether or not this is a correct statement of the law we think that the test of domestication or non-domestication is clearly inadequate to govern all cases: as Professor Glanville Williams has pointed out[37] "rabbits, pigeons and bees may be 'wild' [in the sense that they are not generally domesticated], they are certainly not assumed to be dangerous." In our opinion the essential test should be whether the species of animal presents a special or substantial danger. However, we do of course agree that general domestication of a species, whether in England or other parts of the world, is often highly relevant to the danger it presents, and we would suggest that the fact that a species is generally domesticated in the British Isles should exclude it from the ranks of those species which the law regards as dangerous. In this way the law would reflect the common experience of everyday life.

(iii) Should the law be modified so that animals which present a special danger to property are treated in the same manner as those which are a special danger to mankind? We appreciate that it may be possible to show, in the case of some animals which are relatively harmless to mankind in their wild state, that they become especially dangerous to mankind in captivity and perhaps by this indirect route to make good a claim for damage to property done, for example, by a fox which escapes from captivity.[38] We think it better however directly to establish a category of animals for which there is strict liability because they present a special danger either to persons or to property.

(iv) In the light of our answer to the question asked in (iii) above, should strict liability be imposed in respect of injury to the person inflicted by an animal which is a special danger to property but not to mankind? There is some logic in the present law which imposes strict liability for damage to property by an animal belonging to a species which is a danger to mankind, in so far as the damage to property may arise or be enhanced because the fierce reputation of the animal may deter the owner of property from intervening. We doubt however whether it would be worthwhile on this basis to establish an exception to strict liability for the cases in which an animal which is only a special danger to property inflicts personal injury.

16. We recommend the imposition of strict liability for all animals belonging to a species which constitutes a special danger to persons or to property. By a special danger we mean that animals of that species are likely to cause damage or that any damage which they may cause is likely to be severe. Whether a species constitutes such a danger should in our view depend, as is at present the position with regard to the category of animals *feræ naturæ*, upon a test

[37] (1940) 56 *L.Q.R.* 354.
[38] As in effect suggested by Professor Glanville Williams, *op. cit.* (n. [8] above), p. 296.

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prescribed by law. Species which are generally domesticated in the British Isles should not be regarded as dangerous; but in determining whether other species are dangerous a court should regard as the decisive consideration the risk to persons or property in the circumstances of this country, taking account of the domesticated or non-domesticated character of the species abroad only to the extent that that factor may be relevant to the degree of risk which the species presents in the circumstances of this country.

17. If, as we have recommended, there is to be a category of animals of a dangerous species for which strict liability is imposed, it would seem reasonable that an animal not belonging to that category should nevertheless give rise to strict liability in respect of injury or damage which it causes if that damage results from dangerous characteristics of the particular animal which are known to its keeper. As far as the potential defendant is concerned, he is equally the creator of a special risk if he knowingly keeps, for example, a savage Alsatian as if he keeps a tiger. As far as the potential plaintiff is concerned, an animal belonging to an ordinarily harmless species, which is known to its keeper to be dangerous is in the nature of a trap—a "wolf in sheep's clothing"—which would seem to justify the same strictness of liability as applies to an obviously dangerous animal.

18. The law at present achieves this imposition of strict liability by the *scienter* rule, but we think that this rule requires considerable modification and simplification. We would therefore abolish it in its common law form and substitute a new rule retaining what we conceive to be the essential rationale of the old law:

(i) What should be required to bring this type of strict liability into operation is that the keeper of the animal should know of characteristics of the animal which are dangerous in that they either make it likely to inflict damage of the kind which in fact results or make it likely that any damage of that kind which it may cause will be severe. Such a formulation would free the present law from many of its technicalities. It would, for example, no longer be necessary in respect of an animal with a dangerous disease to show that it had spread the disease by some act in the nature of an attack which the animal had a known propensity to make; the plaintiff would succeed if he could prove that the keeper knew the animal had the disease and that it had spread the infection. Our suggested formulation would also, by emphasizing the objective risk of injury or damage, make unnecessary any difficult enquiry into the "state of mind" of the animal, showing its aggressive intention as contrasted with its actual behaviour.

(ii) We have stated above[39] that to be strictly liable under the *scienter* doctrine the keeper of an animal may under the present law have to be aware of a propensity of the animal contrary to the nature of its species. We feel that there is here some danger of confusion. If an entire species of non-domesticated animals exhibits dangerous characteristics then under our proposals[40] there will be strict liability for any animals of that species, and no enquiry is needed into the knowledge of the keeper. If, however, the animal does not belong to a dangerous species, it is of course

[39] See paragraph 6 above.
[40] See paragraphs 14, 15 and 16 above.

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essential to consider whether the keeper knew of any dangerous characteristics in his animal. In our view the fact that a particular animal belonging to a non-dangerous species shares these characteristics with other animals within the species, either at a particular age, at certain times of the year or in special conditions, should not preclude liability where the keeper knows of the presence of these characteristics in his animal at the time of the injury. If the keeper of a bitch with a litter knows that it is prone to bite strangers, then even if this is a common characteristic of bitches at such a time, we think that the keeper should be strictly liable,[41] subject to the permissible defences, which we consider below.[42]

19. The strict liability which we recommend should be imposed for animals of a dangerous species and for other animals possessing known dangerous characteristics should not in our view depend on the "escape from control" of the animal. In the circumstances suggested by Devlin J. in *Behrens* v. *Bertram Mills Circus Ltd.*[43] if an elephant "slips or stumbles" we think the keeper should be liable for any injury or damage which it thereby causes. We would favour the approach adopted by the Court of Appeal of British Columbia in *McNeill* v. *Frankenfield*[44] where the Court, in dealing with the requirement of "escape" in respect of a tethered dog, said that for a dog to "escape" in this sense it was not necessary that it should get at large or loose, but merely that the control or restraint that one assumes a keeper will put on a vicious dog proved in fact insufficient to prevent the dog doing injury.

20. We also consider that there should be no rule that strict liability in respect of animals does not apply as between employer and employee.[45] The case of *Rands* v. *McNeil*[46] suggests that strict liability is severely limited as between employer and employee by the application of the maxim "*volenti non fit injuria*",[47] but we think that in these cases the employee should not be taken voluntarily to assume risks incident to his employment in connection with dangerous animals. The rationale of imposing strict liability for a peculiarly dangerous activity is that the person carrying it on is in the best position to take precautions against or to mitigate the damage which may flow from that activity. Insurance is one of the principal methods which he may utilize to minimize the harmful consequences of his activity, and we think that in this context the employer is clearly in a better position conveniently to effect adequate cover against liability for his animal than is the employee to effect insurance against his injury.

21. With regard to the defences available in an action based on strict liability for dangerous animals, we would retain the defences:

(i) that the plaintiff by reason of his negligence was solely responsible for the injury or damage;

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[41] This may be inferred from *Barnes* v. *Lucille Ltd.* (1907) 96 L.T. 680.
[42] See paragraph 21.
[43] See n. [8] above.
[44] (1963) 44 D.L.R. (2d.) 132.
[45] In *Barnes* v. *Lucille Ltd.* (see n. [41] above) an apprentice succeeded in an action in respect of a bite by the master's dog kept on the premises.
[46] See n. [10] above.
[47] See Morris L.J., in *Rands* v. *McNeil* (n. [10] above) at p. 272.

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(ii) that the plaintiff voluntarily assumed the risk of injury or damage arising from the dangerous animal (subject to the reservation in paragraph 20 above precluding the application of this doctrine to a person who is employed in connection with dangerous animals),

and the partial defence that the plaintiff contributed by his negligence to the injury or damage.[48]

22. As far as the trespassing status of the plaintiff is concerned, we recognize that there are some circumstances in which it would seem unreasonable to impose strict liability for injury or damage done by an animal on property where the plaintiff was a trespasser. Thus it may be argued that a person who keeps a fierce dog to protect property should not be liable for injury which it does to a burglar. On the other hand it may be said that a defendant should not escape strict liability if he, for example, chooses to guard his property with a tiger. More difficult perhaps is the problem presented by a person who merely keeps an animal either of a dangerous species or, not being of such a species, with known dangerous characteristics, without any intention of using it to guard his property; examples of these situations would be that of the zoo keeping lions and tigers or a farmer who is simply depasturing in his field a bull which he knows to be dangerous.

23. In considering a possible solution to the types of problem raised in the preceding paragraph we would first emphasize that we are here considering only the strict liability of the defendant *vis-à-vis* a trespasser. It may be justifiable to exempt a defendant from strict liability for his animals to a trespasser in circumstances in which it would be unjustifiable totally to exempt him from an obligation to exercise reasonable care; we refer below[49] to the question of the trespassing status of the plaintiff as a defence to negligence liability. We have already referred to the fact that under the existing law in certain circumstances the trespassing status of the plaintiff may afford a defence to a claim under the rule of strict liability for injury or damage done by an animal. Those circumstances are not very clearly defined. The trespassing status of the plaintiff is probably a defence if reasonable notice is given of the dangerous animal,[50] although it is doubtful whether the absence of such notice would necessarily deprive the occupier defendant of this defence;[51] for example, Scrutton L.J. in *Sycamore* v. *Ley*[52] appeared to suggest that an occupier would not be liable for a bite inflicted by his savage dog on a burglar and made no qualification regarding notice. We consider that at least as far as strict liability is concerned

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[48] In view of the emphasis which we have placed on the possibility of insurance in paragraph 20 it could be argued that the negligence of the plaintiff should be neither a complete nor a partial defence to any claim against the keeper of a dangerous animal, but we doubt whether public opinion would accept so great a departure from the traditional basis of tort liability.

[49] See paragraph 58 below.

[50] See *Bird* v. *Holbrook* (1828) 4 Bing. 628 which however concerned a spring gun.

[51] In another spring gun case (*Ilott* v. *Wilkes* (1820) 3 B. & Ald. 304) where there was notice the defendant was held not liable.

[52] (1932) 147 L.T. 342 at p. 344. In the old case of *Brock* v. *Copeland* (1794) 1 Esp. 203 the defendant was held not liable for injuries inflicted by his savage dog on the plaintiff who was his foreman and had re-entered the plaintiff's premises after they had been closed for the night. Dicta which appear to afford the defendant a defence to a claim for injuries inflicted by a bull with known dangerous propensities upon any kind of trespasser are to be found in *Blackman* v. *Simmons* (1827) 3 Carr. & P. 138 at p. 140 and in *Hudson* v. *Roberts* (1851) L.J. Ex. 299 at p. 300.

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the law ought to be put on a more certain basis. Bearing in mind the consideration emphasized above that what may be a defence to strict liability may not even under the present law also be a defence to a claim in negligence, we recommend therefore that where the plaintiff proves that he has suffered injury or damage caused by an animal kept by the defendant it should be a good defence to any claim based upon strict liability for a dangerous animal for the defendant to prove that:

(i) the plaintiff was a trespasser on the property where the animal was kept;

(ii) where the animal does not belong to a dangerous species it was not kept there to cause damage to trespassers; and

(iii) where the animal belongs to a dangerous species, it was not kept there to cause damage to or to deter trespassers.

24. We would abolish the defence of Act of God, which appears to be of little practical importance in this field and only to add an unnecessary complication to the law. We would also resolve any doubts which may remain in spite of the majority view in *Baker* v. *Snell*[53] as to the availability of the defence of the act of a third party, by a clear rule that this defence is not available. In view of the rationale of strict liability for special risks[54] it is our view that the act of a third party is one of the circumstances against which the person creating the risk should take precautions.

25. We sum up our recommendations regarding strict liability for animals of a dangerous species and for other animals with known dangerous characteristics as follows:

(i) Strict liability should be imposed in respect of any injury or damage done by animals of a species which presents a special danger to persons or property.

(ii) The question whether an animal belongs to a dangerous species should depend, as is at present the position with the category of animals *feræ naturæ*, upon a test prescribed by law; and in determining this question a court should regard as the decisive consideration the risks to persons or property in the circumstances of this country. A species of animals which is generally domesticated in the British Isles should not be regarded in law as dangerous, but with regard to other species their domesticated or non-domesticated character abroad should be taken into account only to the extent that this factor may be relevant to the degree of risk which such species present in the circumstances of this country.

(iii) Strict liability should also be imposed in respect of injury or damage done by an animal which does not belong to a dangerous species, if the particular animal had known dangerous characteristics from which the injury or damage in fact resulted. Such characteristics should be capable of giving rise to strict liability even if, though not common to the species as a whole, they are shared by other animals within the species, whether at a particular age, at certain times of the year, or in certain conditions.

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[53] See n. [28] above.
[54] See paragraph 20 above.

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(iv) Strict liability in respect of either of the two categories should not be dependent on escape from control.

(v) The fact that the plaintiff by reason of his negligence was solely responsible for the injury or damage, his voluntary assumption of the risk, and, to the extent that it contributed to the injury or damage, contributory negligence should be defences. But liability should not be restricted between employer and employee on the ground of voluntary assumption of risk. It should also be a defence that the injury or damage occurred on property where the plaintiff was a trespasser if, where the animal does not belong to a dangerous species, it was not kept there to cause damage to trespassers and, where the animal belongs to a dangerous species, it was not kept there to deter or to cause damage to trespassers.

(*d*) *The General Liability for Negligence*

26. It is a general principle of English law that a person is liable for injury or damage done by his animal as a result of his failure to take reasonable care. This principle was clearly stated by Lord Atkin in *Fardon* v. *Harcourt-Rivington*[55] as follows:

> "Quite apart from the liability imposed upon the owner of animals or the person having control of them by reason of knowledge of their propensities, there is the ordinary duty of a person to take care either that his animal or his chattel is not put to such a use as is likely to injure his neighbour—the ordinary duty to take care in the cases put upon negligence." [56]

We do not intend that any of our proposals should disturb this principle. We think it important that, apart from strict liability for animals, the flexible claim for negligence should be available without the tendency shown in some earlier cases to treat propositions of fact, concerning the behaviour of animals and the care to be exercised by their keepers, as propositions of law.[57]

27. It was proposed by the Goddard Committee that in the general action for negligence in respect of damage done by animals the burden of proof should be put on the defendant to show that he had exercised due care, but this suggestion must be considered against the background of their other main proposal that the categories of strict liability for animals *feræ naturæ* and under the *scienter* action should be abolished. The Law Reform Committee for Scotland, although they too would have abolished these categories of strict liability, did not however recommend that the burden of proof in the negligence action should be reversed. The majority of members of the Bar and solicitors who gave their views to the Commission also held the latter view. Those members of the Torts Sub-Committee of the Law Reform Committee of the Society of Public Teachers of Law who would accept negligence as the general basis of liability for damage done by animals would for the most part leave the burden of proof on the plaintiff. The other interests consulted would almost all agree, although some as already stated would retain strict liability to a greater or lesser extent; the exceptions are the National Union of Agricultural Workers which, favouring the abolition of strict liability, would impose a general liability in negligence with a reversed burden of proof, and the Rural District Councils' Association which, while it

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[55] (1932) 146 L.T. 391.
[56] At p. 392.
[57] See the Report of the Goddard Committee (n. [1] above), paragraph 1.

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would prefer to retain the present categories of strict liability, would, if an alternative overall liability in negligence were imposed, reverse the burden of proof.

28. We take the view that, as we have recommended the retention with some modification of strict liability for injury or damage done by animals, it is not necessary or desirable to reverse the burden of proof in the cases affecting animals which turn upon negligence; the balance of views obtained from our consultations would appear to support this course.

(e) The Searle v. *Wallbank exception to liability for negligence*

29. To the general liability for negligence there is in the case of animals an important exception under the present law. A school authority may be liable for negligence in allowing a child to wander on to the highway and there cause an accident.[58] But the occupier of land adjoining the highway from which an animal gets on to the highway, there causing injury or damage to a user of the highway, is not liable in negligence, even if it is possible to show that in allowing the animal to escape he failed to exercise reasonable care and that the user was guilty of no contributory negligence. This exception to the general rule was confirmed by the House of Lords in *Searle* v. *Wallbank*[59] (where the appellant collided on the highway with a horse belonging to the respondent which had escaped from a field in which the respondent had placed it.)

30. Before expressing any view as to the validity of the criticisms which have been made of the law laid down in *Searle* v. *Wallbank* we think it important to emphasize that the exception to negligence liability there recognized is subject to qualifications of uncertain extent and authority. Whether or not it is desirable to modify or abolish the exception, it would seem important in the interests both of the occupiers of land as well as of those damaged by animals on the highway that the law should be made more certain. While it is clear that the principle behind *Searle* v. *Wallbank* does not apply to animals brought on to the highway,[60] it has been said to be debatable whether it applies in urban as opposed to rural areas.[61] It has also been suggested that there may be topographical circumstances of the place where the accident happened which may exclude the rule.[62] Another possible limitation on the rule, favoured by two Lords Justices in one decision[63] of the Court of Appeal but rejected unanimously by the Court in another case,[64] would not apply it to dogs on the highway.

31. However qualified, the exception from negligence liability recognized in *Searle* v. *Wallbank* has been the subject of frequent and strong judicial criticism.

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[58] See *Carmarthenshire County Council* v. *Lewis* [1955] A.C. 549.

[59] [1947] A.C. 341.

[60] *Gomberg* v. *Smith* [1963] 1 Q.B. 25.

[61] See e.g., Lord Goddard C.J. in *Carmarthenshire County Council* v. *Lewis* (n. [58] above) at p. 561; Holroyd Pearce L.J. in *Gomberg* v. *Smith* (n. [60] above) at p. 34, although Harman and Davies L.JJ. in the same case thought otherwise.

[62] See Ormerod L.J. in *Ellis* v. *Johnstone* [1963] 2 Q.B. 8 at p. 21; Evershed M.R. in *Brock* v. *Richards* [1951] 1 K.B. 529 at p. 534 clearly took a different view, saying that "the law is founded upon our ancient social conditions and is in no way related to, or liable to be qualified by, such matters as the relative levels of fields and highways, the nature of the highway, or the amount of traffic upon it".

[63] *Gomberg* v. *Smith* (see n. [60] above).

[64] *Ellis* v. *Johnstone* (see n. [62] above).

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Thus in *Hughes* v. *Williams*[65] which was decided before *Searle* v. *Wallbank*, Lord Greene M.R. said:

> "In my opinion, this court is bound by a rule of law which I dislike but which has been stated or assumed to exist in several pronouncements of this court . . . The rule appears to be ill-adapted to modern conditions. A farmer who allows his cow to stray through a gap in his hedge on to his neighbour's land, where it consumes a few cauliflowers, is liable in damages to his neighbour[66] but if through a similar gap in the hedge it strays on to the road and causes the overturning of a motor omnibus, with death or injury to thirty or forty people, he is under no liability at all. I scarcely think that this is a satisfactory state of affairs in the twentieth century." [67]

32. A number of unsuccessful attempts have been made in Parliament to change the rule in *Searle* v. *Wallbank*, the latest of which was the Bill introduced by Sir Barnett Janner, M.P., on 29th November 1966.

33. The members of the Bar and solicitors consulted by us, as well as, with two individual exceptions, the Torts Sub-Committee of the Law Reform Committee of the Society of Public Teachers of Law, consider that the rule in *Searle* v. *Wallbank* is not justifiable in modern conditions.

34. That some change in the rule laid down in *Searle* v. *Wallbank* is desirable was accepted by the Goddard Committee, the Law Reform Committee for Scotland, and almost all the organizations listed in Appendix B. The Kennel Club however express satisfaction with the existing law affecting dogs and by implication therefore support the rule so far as it applies to dogs. The Country Landowners Association, while emphasizing that the difficulties to which the rule in *Searle* v. *Wallbank* gives rise are as much due to increasing fast traffic on roads as to straying thereon by animals, would accept a change in the rule of limited scope. The National Farmers' Union draw attention to the historical foundations of the rule for which they consider there are sound reasons; they say that accidents on the roads in which animals are involved are rare and that where they occur the major factor is the modern increase in fast traffic. They point to the practical burdens which a change in the rule might lay upon farmers and, if any change were to be made, would desire that it was circumscribed by a number of qualifications and limitations.

35. Civil Law countries in claims based on negligence in respect of damage done by animals do not appear to recognize any exception to liability comparable to that recognized in *Searle* v. *Wallbank*. In countries which in general have followed the Common Law *Searle* v. *Wallbank* has been criticized by a leading academic authority[68] in Australiâ, and in Canada the Supreme Court in *Fleming* v. *Atkinson*[69] by a majority declined to follow it. The leading judgment by

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[65] [1943] K.B. 574.

[66] A reference to strict liability for cattle trespass with which we deal in paragraphs 60–68 below.

[67] At p. 576. Goddard and MacKinnon L.JJ. in that case expressed similar views. Criticisms made since *Searle* v. *Wallbank* are to be found in *Gomberg* v. *Smith* (see n. [60] above) *per* Davies L.J. (at p. 39) and *Ellis* v. *Johnstone* (see n. [62] above) *per* Donovan L.J. (at p. 27) and Pearson L.J. (at p. 27).

[68] Fleming, *The Law of Torts*, 3rd ed., 1965, p. 332, who suggests that in view of the different history of Australian highways, the case might not be followed by Australian Courts.

[69] (1959) 18 D.L.R. (2d.) 81.

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Judson J. put some weight on the fact that highways in Ontario (in which the case arose) did not come into being as a result of dedication by adjoining owners which, he suggested, might explain the non-liability in England for negligence in respect of straying animals, but were created when the Province was surveyed, with the ownership remaining in the Crown. However, he also pointed out that no cause of action in negligence could in any event have existed until the advent of fast moving traffic and gave a negative answer to the question whether it followed as a consequence that there could be no cause of action today. In the United States, although the question of strict liability for animals which have escaped on to the highway has been considered, and has been affected by legislation in the different States concerning the obligation to fence,[70] it would seem that it is generally accepted that there may be liability for negligence in allowing animals to escape on to the highway.[71] In Scotland, where the law takes an intermediate position between the Civil Law and the Common Law, it appears that at least when the Law Reform Committee for Scotland made its Twelfth Report in 1963, it was uncertain whether the principle behind *Searle* v. *Wallbank* was recognized in Scotland. However, the Committee suggested that the Scottish courts might later rule that this principle was not applicable in Scotland, a forecast which seems to have been confirmed by *Gardiner* v. *Miller*.[72] Lord Thomson said in that case:

> "In my view there may be, and in certain circumstances there is, a duty to take reasonable care to prevent . . . animals from straying on to the highway where there is a foreseeable risk of such straying causing injury to people using the highway." [73]

36. The statistical information bearing on the problems raised by *Searle* v. *Wallbank* which we have been able to obtain is not as comprehensive as we would have wished. Figures for England and Wales supplied by the Home Office and the Ministry of Transport of the number of vehicles in personal injury accidents (including those resulting in death) in which animals were involved were only kept on this basis until 1958.[74] In 1958 there were 4135 vehicles involved in personal injury accidents on highways in which the presence of an animal was considered by the police to have contributed to the accident, out of a total of 375,100 vehicles in all personal injury accidents; in 1957 the comparable figures were 4132 and 338,400.

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[70] Harper & James, *The Law of Torts*, vol. II, pp. 829–32.

[71] Prosser, *Law of Torts*, 3rd ed., p. 513.

[72] [1967] S.L.T. 29.

[73] At p. 33. A road accident may therefore have a very different legal result according to whether it occurs north or south of the Border. The attention of the Commission was drawn in this connection to an accident at Longhorsley in Northumberland in May 1967. A bullock collided with the bonnet of a car driven by a lady who was returning to her home at Wark on the Border. The lady was informed by the police, her insurance company and the Automobile Association that under English law there was no possibility of a remedy against the owner of the bullock; she has since organized a petition, which through her Member of Parliament has been sent to the Ministry of Transport, calling for a change in the law.

[74] With regard to the new basis which is limited to fatal and serious accidents on the highway in which dogs were involved see paragraph 50 below. In this paragraph and in paragraphs 37, 38, 49, 50, 51 and 52 and their relevant footnotes it should be noted that references to animals being involved in highway accidents do not necessarily mean that in all cases they were the sole or principal cause of the accidents.

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37. We have endeavoured to obtain some detailed information on a local basis,[75] but only a few of the police authorities were in a position to supply it, and even those not necessarily on the same basis. We would not wish to suggest that the figures we quote below are necessarily representative of the country as a whole, as the problem is obviously more acute in some areas than in others. Moreover, even in a particular area the problem of straying animals is affected by changing conditions. The relevant factors include the numbers and kinds of animals in an area, the proportion of open roads and the density and speed of traffic, all of which may vary from time to time. All that can be said with certainty is that in absolute rather than comparative figures there is a substantial number of accidents on the highway in which animals are involved, and again in absolute figures a considerable number of people are killed or injured in such accidents.

38. Although extremely limited in its geographical scope, in many ways the most informative set of statistics supplied to us relates to that section of the trunk road A.31 which crosses the New Forest. There is in general no obligation on highway authorities to fence roads for which they are responsible. However, as a matter of practice, the Ministry of Transport do provide and maintain fences on motorways and on certain lengths of trunk roads where it considers there is a serious road safety hazard. But the motorways and trunk roads where this practice has been followed account for only a few hundred miles out of a total of 172,000 miles of highways in England and Wales. One of the lengths of trunk roads so fenced is that part of the A.31 which passes through the New Forest. The Hampshire and Isle of Wight Constabulary have informed us that, before the fencing was completed on 1st July 1964, there were the following accidents in which animals were involved:

1961	81 accidents
1962	94 accidents
1963	80 accidents

In 1964 the number of accidents was reduced to 35, and in 1965, the first full year of fencing, the number fell to 3. In 1966 one accident took place.

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[75] (i) In the Counties of Carmarthen and Cardigan in the years 1961 to 1965 inclusive there were 12,534 highway accidents of all types. The number of accidents involving animals was 2,048, in which 2,070 vehicles were involved. Death or personal injury to humans resulted in 4,807 of the accidents of all types and in 102 of these animals were involved.

(ii) In the area of the Cornwall Constabulary (since 1966 the Cornwall District of the Devon and Cornwall Constabulary) in the years 1961–66 inclusive there were 40,277 highway accidents of all types. 4,792 involved animals. Out of 13,969 accidents in which death or personal injury resulted to humans 300 involved animals.

(iii) In the New Forest Division of the Hampshire and Isle of Wight Constabulary there were in the years 1961–66 inclusive approximately 13,700 highway accidents of all types. Animals were involved in 3,425 of these. Out of approximately 4,750 accidents involving death or personal injury to humans 301 involved animals.

(iv) In the police area of the City of Portsmouth in the years 1961–66 inclusive there were 18,592 highway accidents of all types. The number of accidents involving animals was 1,474, in which 1,516 vehicles were involved and 35 people were injured.

(v) In the area of the Worcestershire County Constabulary there were in the years 1961–66 inclusive 14,359 highway accidents. We have not been supplied with the total number of those which involved animals, nor have we been supplied with the total number of accidents of all types involving death or personal injury. We do know, however, that there were 214 accidents in which animals were involved and in which death or personal injury to humans resulted; 3 people were killed in these accidents and 222 injured.

(vi) In the area of the Devon and Exeter Constabulary (since 1966 the Devon and Exeter District of the Devon and Cornwall Constabulary) we only know that there were in the same period 47,214 highway accidents of all types, in 4,870 of which animals were involved.

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39. Whether or not the above statistical information accurately represents the situation in the country as a whole, it must be borne in mind that when injury to life and limb are being weighed against the cost of the precautions necessary to prevent, or by insurance to mitigate the results of such injury, purely statistical considerations cannot be decisive. Moreover, if the number of accidents caused by animals on the highway were shown to be very small, it might be argued that the cost of insurance against them would be correspondingly small.

40. We have reached the conclusion that the case for changing the principle behind *Searle* v. *Wallbank* is overwhelming. The expanding needs of society as a whole must from time to time require some adjustment of the rights and duties of particular interests within that society; in the present context this means that the balance between the interests of the keepers of animals and users of the highway which was struck in the remote past under very different conditions cannot be wholly maintained in the twentieth century. We recognize however that any such readjustment must take account of the economic and social importance of the keeping of animals and of the burden and practical difficulties which may be involved in ensuring that they do not cause damage on the highway; but against these considerations must be weighed the danger to life, limb and property of those who use the highway.

41. We turn therefore to the nature of the change which should be made in the law as laid down in *Searle* v. *Wallbank*. Almost all whom we have consulted would seem prepared at least to accept as a general rule a duty to take such care as may be reasonable in the circumstances. Difference of opinion however arises as to the desirability and scope of exceptions to this rule; suggested exceptions have been formulated by reference to the nature of the adjoining land through or beside which the highway passes, the type of highway in question, the kind of animal involved or some combination of these factors.

42. As far as the nature of the adjoining land is concerned, we appreciate there are considerable areas in England and Wales which are more or less unfenced, where traffic is relatively slight, where the risk of accidents is small and where it would be unreasonable to impose an obligation in the circumstances to fence in or otherwise to keep animals off the highway, apart from the aesthetic objections to fencing in many beautiful areas of open countryside. It is to be presumed that these were among the considerations, although not specifically stated, that moved the Goddard Committee to recommend that there should be no obligation to prevent animals straying on to such parts of a highway "as pass over any common, waste or unenclosed ground". This exception was borrowed from section 25 of the Highways Act 1864, which imposed a criminal penalty on the owner of cattle "found straying on or lying about any highway or across any part thereof or by the sides thereof, except on such parts of any highway as pass over any common or waste or unenclosed land".[76] This

[76] Replacing similar provisions in earlier legislation, this section has in its turn been replaced and substantially re-enacted by section 135(1) of the Highways Act 1959. Until recently the penalty was five shillings for each animal subject to a maximum of thirty shillings in any one case. "Cattle" means only horses, cattle (in ordinary speech) sheep, goats or swine. The Criminal Justice Act 1967 Schedule 3 increases the fines to £20 for a first offence and £50 for a second or subsequent offence. We are in this report only concerned with civil remedies for damage done by animals and it should be noted that the criminal statute does not give rise to any civil liability, a possibility which was denied in *Heath's Garage Ltd.* v. *Hodges* [1916] 2 K.B. 370 at p. 383.

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exception from liability for negligence is in effect favoured by some of the members of the Bar and solicitors whom we have consulted and by the Chartered Land Societies' Committee, the Country Landowners' Association, the National Union of Agricultural Workers (who describe their proposed exception as relating to "moors, forests and commons") and by the Rural District Councils' Association (who would confine the exception to commons). The National Farmers' Union reach a somewhat similar result by a different route. They are against liability for negligence save in respect of land which is separated from the road by a stockproof type of fence, hedge or wall. However, the other interests we have consulted would not favour a specific exception of the type proposed by the Goddard Committee.

43. As far as "unenclosed land" is concerned, we think that not much guidance can be obtained from its use in statutes imposing criminal penalties, where, especially in more recent years when the maximum penalty became almost nominal, the problem of definition has not been seriously faced.[77] Moreover, apart from the question of definition, it would be extremely arbitrary to fix an exemption from liability for negligence only by reference to whether land was enclosed or unenclosed, irrespective of other considerations, such as traffic on the road concerned. Such an exception might also discourage fencing or other preventive measures where it would be reasonable to undertake them and perhaps even encourage the removal of existing barriers.

44. The Goddard Committee also proposed to exclude negligence liability in respect of animals straying on to the highway from any "common" or "waste".[78] It would seem clear that the main rationale of the Goddard Committee's exception is to be found in the fact that, where land is subject to rights of common, commoners having animals on such land have no rights in the soil in which any fence would have to be set; in any event section 194 of the Law of Property Act 1925 renders unlawful the erection of any fence whereby access to land subject to rights of common is prevented or impeded unless the consent of the Minister of Housing and Local Government is obtained. In giving or withholding his consent the Minister is required to observe the provisions of section 10 of the Commons Act 1876 which sets out the factors to be considered in deciding whether an application under the Inclosure Acts 1845 to 1882 shall be granted. The Royal Commission on Common Land, 1955–58,[79] made certain proposals designed to facilitate the provision of roadside fencing by commoners, but the Commons Registration Act 1965 has only implemented those recommendations of the Royal Commission which related to the registration of rights in common land.[80] Until, therefore, under further legislation, procedures have been adopted for the co-operation of such persons in matters affecting the land, including in particular fencing, we think it would be reasonable to make special provision for a person who keeps animals on common land. We therefore recommend that a person should not be regarded as committing a breach of the duty to take care by reason only of placing animals on any

[77] In *Bothamley* v. *Danby* (1871) 24 L.T. (N.S.) 656 at p. 659 Blackburn J. said only that unenclosed land meant unenclosed land "of some magnitude".

[78] For these concepts see Report of the Royal Commission on Common Land, 1955–58 (Cmnd. 462), Appendix III, paragraphs 6–47.

[79] See n. ([78]) above, paragraph 387.

[80] The process of determining rights in common land, including the objections to claims, is to be completed by 1972.

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common land (within the meaning of the Commons Registration Act 1965) in any case where it is lawful for him to do so.

45. The second possible limitation on the scope of liability for negligence in respect of animals straying on the highway involves the categorization of highways. Thus the National Farmers' Union would limit any liability for negligence to cases of strying on to "trunk" or "classified" roads, with account taken of the scheme introduced in Part III of the Local Government Act 1966 which came into effect on 1st April 1967. The Country Landowners Association would exclude liability in respect of public footpaths, bridleways, drift ways and "unclassified" roads. The Chartered Land Societies' Committee suggest that liability should be excluded in respect of roads other than "special roads",[81] "trunk roads" and "classified" roads, as well as "principal" roads under Part III of the Local Government Act 1966.

46. Our basic objection in the present context, to any distinction between roads based on the categories mentioned in the preceding paragraph is that it has no very direct bearing on the dangers likely to arise from straying animals. The granting of trunk or classified status is made by reference to the importance of the road for through traffic; this may have little bearing upon the actual condition of the road, upon the volume of traffic likely to use it or upon the likely speed of traffic on the road. Trunk roads are roads for which the Minister of Transport (in Wales, the Secretary of State) is the highway authority. They are roads which are maintained entirely at the expense of the central government. Other roads have been "classified" for the purpose of grants by the central government to local highway authorities, the amount of the grant depending on the importance of the road for the purposes of through traffic. The "classified road" system underwent a substantial change on 1st April 1967 when Part III of the Local Government Act 1966 came into force and classification for grant purposes was limited to "principal roads", though many roads which have hitherto been "classified roads" for grant purposes will remain classified for other purposes—e.g., in connection with the Highways and Town and Country Planning Acts. The use of these distinctions in connection with liability for animals might furthermore introduce into the process of categorization a contentious element likely to disturb the efficient administration of the highway system.

47. Nor do we think it is necessary or desirable to make an exception from liability for negligence in respect of animals on public ways which are limited to non-vehicular traffic, namely footpaths (limited to pedestrians), bridleways[82] and drift ways.[83] But of course in the absence of vehicles the risk that the presence of an animal will lead to damage or injury is slight and therefore, save in exceptional cases, there will be no negligence and no liability.

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[81] "Special roads", the creation of which was first authorized by the Special Roads Act 1949, are in general motorways and as most motorways have been constructed by the Ministry of Transport they are "trunk" roads. Where they have been constructed by local highway authorities they would in practice always be classified as "Class I" roads under the system explained in paragraph 46, or as "principal" roads under the Local Government Act 1966.

[82] Defined in section 295 of the Highways Act 1959 as "a highway over which the public bave the following, but no other rights of way, that is to say, a right of way on foot and a right of way on horseback or leading a horse, with or without a right to drive animals along the highway".

[83] A way along which there is a right to drive cattle. This also includes a right to proceed on foot. See Pratt and Mackenzie, *Law of Highways*, 20th ed., 1962, p. 11.

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48. The third possible limitation on liability for negligence in respect of animals straying on the highway would restrict liability to, or exclude, certain animals. The Goddard Committee envisaged liability only in respect of cattle and poultry. The Country Landowners' Association would exclude liability for dogs and poultry. The Chartered Land Societies' Committee would exclude liability for deer, cats, dogs aud poultry. The National Farmers' Union would exclude liability for poultry and cats.

49. With regard to dogs,[84] we agree with the National Farmers' Union that it would not be reasonable to exclude their keepers from liability for negligence, in view of the considerable statistical evidence that they are more frequently involved in accidents on the highway than other animals. Statistics for England and Wales which were only kept on this basis until 1958 give the following figures:

Number of Vehicles involved in fatal or personal injury accidents in the highway involving animals

	Tatal	*Dogs*	*All other animals*	*Percentage of tatal vehicles invalved in fatal or persanal injury highway accidents*
1958 .	4,135	2,731	1,404	0·73 (dogs) + 0·37 (other animals) = 1·10%
1957 .	4,132	2,689	1,443	0·79 (dogs) + 0·43 (other animals) = 1·22%

50. For the years 1961–66 information on a national basis is only available on the number of fatal and serious injury accidents on the highway in which dogs were reported as being in the carriageway at the time of the accidents and the relationship of these figures to all fatal and serious injury accidents.

The figures are as follows.

	Fatal and serious injury accidents invalving dags	*Percentage af tatal fatal and seriaus injury accidents*
1961 . . .	552	0·71%
1962 . . .	498	0·65%
1963 . . .	423	0·54%
1964 . . .	533	0·62%
1965 . . .	528	0·60%
1966 . . .	470	0·53%

51. We have also been able to obtain the figures for the Metropolitan Police area relating to personal injury accidents in which dogs were involved.

	Tatal number af personal injury accidents in which dags were invalved an the highway
1961 . . .	336
1962 . . .	309
1963 . . .	321
1964 . . .	312
1965 . . .	322
1966 . . .	312

[84] We should mention, in connection with dogs, that section 220 of the Road Traffic Act 1960 empowers local authorities to designate roads within their area with the effect that a person who causes or permits a dog to be on such a road without the dog being held on a lead is guilty of an offence, punishable by a fine not exceeding £5. Until November 1962 the consent of the Minister of Transport was required for sucb designations and during the period these designations had to be confirmed (the power to designate was first given by the Road Traffic Act 1956, section 15) consent was given in some 300 cases, covering from single lengths of road to whole boroughs, e.g., Slough. No national figures are available for the period since November 1962. Tbis provision is obviously useful in reducing the risk of accidents caused by dogs, but is only of limited relevance for our present purpose as it does not appear likely that its breach would give rise to civil liability.

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52. The relative importance of dogs in highway accidents suggested by the 1957–58 figures is on the whole borne out by the local statistics we have been able to obtain.[85]

53. As far as deer are concerned, we recognize that in certain circumstances they may be wild in the same sense as hares or rabbits. In this event the question of liability in negligence for their straying on to the highway can hardly arise as they cannot be said to have an owner or keeper. But if on the facts of a particular case the deer in question can be said to have been reduced into the keeping of a person we see no special considerations which should entitle him to exemption from negligence liability if they stray on to the highway.[86]

54. We also recognize that it is very difficult to contain cats and poultry. We doubt however whether it is necessary specifically to provide an exemption for them, in view of the considerations which, as set out below, ought in our view to be prescribed for the guidance of the tribunal in determining whether there has been in a particular case a failure to take reasonable care in respect of injury or damage caused by an animal on the highway.

55. We recommend therefore that the rule in *Searle* v. *Wallbank* which excludes or restricts the duty of care which might otherwise be owed in respect of animals straying on to the highway should be abolished, subject to the qualification relating to common land discussed above.[87] We envisage that the burden of proving a failure to take reasonable care should be on the plaintiff and that the defences available in the action based on negligence, including that of contributory negligence, would be available.

56. We would emphasize that such a duty of reasonable care would not in all the circumstances require the keeper of animals to keep his animals from straying on to the highway. Nor would it impose on the occupiers of land adjoining highways an automatic and general duty to fence such land. These points are made clear by the factors to which we would require a court to have regard, as set out in the succeeding paragraph. We appreciate that our recommendation

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[85] (i) In the counties of Carmarthen and Cardigan in the years 1961–65 inclusive there were 2,048 highway accidents of all types in which animals were involved; dogs were involved in 1,405 of these.

(ii) In the area of the Cornwall Constabulary (since 1966 the Cornwall District of the Devon and Cornwall Constabulary) there were in the years 1961–66 inclusive 4,792 highway accidents of all types involving animals and dogs were involved in 3,888 of these.

(iii) In the New Forest Division of the Hampshire and Isle of Wight Constabulary in the years 1961–66 inclusive there were 3,425 highway accidents of all types involving animals and dogs were involved in 1,044 of these.

(iv) In the police area of the City of Portsmouth in the years 1961–66 inclusive there were 1,474 highway accidents of all types involving animals and all of these involved dogs.

(v) In the area of the Worcestershire Constabulary in the years 1961–66 inclusive there were 214 highway accidents involving animals in which death or personal injury resulted to humans, 136 of which involved dogs.

(vi) In the area of the Devon and Exeter Constabulary (since 1966 the Devon and Exeter District of the Devon and Cornwall Constabulary) there were in the years 1961–66 inclusive, 4,870 highway accidents of all types involving animals, 3,356 of these involved dogs.

[86] In the Irish case of *Brady* v. *Warren* [1900] 2 I.R. 632 an action for cattle trespass in respect of deer succeeded. See Professor Glanville Williams, *op. cit.* (n. [8] above) at pp. 147–8.

[87] See paragraph 44 above.

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would mean, in practice, that prudent farmers and other keepers of animals would feel obliged to insure against the risks involved. We should have liked to give some indication of the cost of insurance; but, owing to the lack of precise statistical information, to which we have referred above, the insurance organisations that we have consulted have been unable to tell us at this stage what premium might be charged in different circumstances.

57. To assist the tribunal determining whether there had been a failure to take reasonable care, and to provide guidance in advance to keepers of animals as to the standard of care expected of them, we would specifically require that in this determination the tribunal should have regard, among other matters, to

(i) the nature of the land from which the animals strayed and its situation in relation to the highway;

(ii) the use likely to be made of the highway at the time when the damage was caused;

(iii) the obstacles, if any, to be overcome by animals in straying from the land on to the highway.

(iv) the extent to which users of the highway might be expected to be aware of and guard against the risk involved in the presence of animals on the highway;

(v) the seriousness of any such risk and the steps that would have been necessary to avoid or reduce it.

(f) Trespassers and Liability for Negligence in respect of Animals

58. In our treatment of strict liability for animals we said that there might be circumstances in which it might be justifiable to exempt the defendant occupier from strict liability for his animals although not necessarily justifiable to exempt him from an obligation to use reasonable care.[88] The Occupiers' Liability Act 1957, in defining the duty of care incumbent on the occupier of premises in relation to his "visitors", did not disturb the common law governing the relationship between an occupier and a trespasser. To a limited extent the existing law recognizes the necessity of striking a balance between the rights of the occupier and a trespasser. Thus, a defendant occupier must not do an act "with [the] deliberate intention of doing harm [to the trespasser]" or an act "with reckless disregard of the presence of the trespasser." [89] We do not however consider that it would be appropriate within the terms of reference set by the topic of civil liability for damage or injury done by animals to make recommendations which would affect the common law covering occupiers and trespassers generally. Apart from other considerations, it would clearly be desirable to consult a much wider circle of interests affected than has been necessary in the context of this report. Nor do we think it would be appropriate for us to deal separately with negligence liability towards trespassers as far as damage or injury done by animals is concerned, in view of the fact that the principles

[88] See paragraphs 22 and 23 above.

[89] *Robert Addie & Sons (Collieries) Limited* v. *Dumbreck* [1929] A.C. 358 at p. 365, cited by the Judicial Committee of the Privy Council in *Commissioner for Railways* v. *Quinlan* [1964] A.C. 1054 at p. 1073. See also the decision of the Court of Appeal in *Videan* v. *British Transport Commission* [1963] 2 Q.B. 650 in which Lord Denning M.R. said (at p. 666) that "The simple test . . . [of] foreseeability is sufficient to explain all the cases on trespassers", a view which was however rejected in *Quinlan's Case* at p. 1086.

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involved are likely to be very similar to those relevant to other types of danger.[90]

(*g*) *Summary of Recommendations regarding Liability for Negligence*

59. It may be convenient at this point to set out in summarized form our main recommendations on liability in negligence for damage or injury caused by animals:

(i) The general principle of the present law that the keeper of an animal is under a duty to take reasonable care to prevent that animal causing injury or damage should be retained.

(ii) The partial exception to this principle recognized in *Searle* v. *Wallbank* should be abolished, but in deciding whether the keeper of an animal has exercised reasonable care in respect of injury or damage caused by the presence of that animal on the highway, a tribunal should have regard to a number of special considerations.[91]

(iii) Notwithstanding (ii) above a person should not be regarded as committing a breach of the duty to take care by reason only of placing animals on any common land (within the meaning of the Commons Registration Act 1965) in any case where it is lawful for him to do so.

However, this qualification should be reconsidered in the event of further legislation facilitating the co-operation of commoners in the improvement, in particular fencing, of land over which they have common rights.

C. LIABILITY FOR CATTLE TRESPASS

60. At common law there is strict liability in respect of bulls, oxen, cows, sheep, goats, pigs, horses, asses and poultry (but not dogs and cats) which trespass on the land of the plaintiff. This liability is enforced by what is known as the action for cattle trespass. It was formerly thought (and was assumed by the Goddard Committee) that liability for cattle trespass certainly covered damage to land and crops; but there was some doubt (shared by the Goddard Committee) whether it covered damage to other animals or goods which were on the land.[92] It was not generally thought that it covered injury to the person of the occupier of the land upon which trespass was committed, but in 1954 in *Wormald* v. *Cole*[93] the Court of Appeal awarded damages for cattle trespass in respect of an injury suffered by the plaintiff occupier when knocked down and injured by a trespassing heifer.

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[90] If it were decided to impose a general duty of reasonable care on the part of the occupier towards a trespasser the relevant considerations in the case of injury or damage caused by an animal might include the following:

(i) The purpose (if any) for which the animal is on the premises at the time in question and how far it is a reasonable use of the premises to keep or bring the animal thereon for that purpose; in particular, if the purpose or one of the purposes for which the animal is on the premises is that of deterring trespassers, how far it is reasonable to use the animal in question for that purpose.

(ii) Whether the precautions (including warning notices, if any) taken to keep trespassers off the premises or to provide for the safety or persons thereon were in the circumstances reasonably adequate, having in particular regard to the nature of potential trespassers and the likelihood of their entry.

[91] See paragraph 57 above.

[92] But before the Goddard Committee reported it had been held in *Ellis* v. *Loftus Iron Co.* (1874) L.R. 10 C.P. 10 that damages could be recovered for a bite inflicted by the defendant's trespassing stallion upon the plaintiff's mare, and in *Cooper* v. *Railway Executive* [1953] 1 W.L.R. 223 the defendants recovered on a counterclaim for damage done by the plaintiff's trespassing cattle to their goods (i.e., a railway train and track).

[93] [1954] 1 Q.B. 614.

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61. It appears somewhat anomalous that strict liability should be imposed in respect of trespassing cattle, when the common law generally requires proof of negligence even in cases involving a greater risk of serious personal injury than the keeping of domestic animals—as, for example, when a gun is fired. And, if cattle trespass were limited to damage to land and crops, it might further be suggested the law put a higher value on these material things than on life and limb. Moreover, even if it is desirable to retain strict liability for cattle trespass in some form, it would seem necessary to clarify the details of its application, in particular in regard to the available defences.

62. The majority of the Goddard Committee, being of the opinion on the evidence presented to them that the action for cattle trespass mainly concerned farmers, who well understood its implications and were enabled thereby to avoid litigation involving allegations of negligence, favoured the retention of the action. They would however have limited it to damages done to land and to crops, whether growing or gathered. Professor A. L. Goodhart would also have retained the action but would have allowed it in addition in respect of damage to other animals, as where trespassing cattle infect a herd on neighbouring land. Professor Glanville Williams favoured the abolition of the action both because of its anomalous nature in the law of tort and on the ground that the defences were obscure and in practice frequently involved issues of negligence in any event. The Law Reform Committee for Scotland recommended the retention and modernisation of an action, somewhat similar to cattle trespass, developed from the Winter Herding Act 1686. Those members of the Bar and solicitors consulted by us who expressed views on cattle trespass were equally divided on the question whether the action should be retained. The Torts Sub-Committee of the Law Reform Committee of the Society of Public Teachers of Law were only prepared to retain the separate action of cattle trespass if its retention was generally desired by farmers, the majority feeling that, if retained, it should be limited to cases of damage to land and crops. The Chartered Land Societies Committee were in favour of retaining the action, which they considered should cover damage or injury to other animals, chattels or persons, as well as to land and crops. The Country Landowners' Association felt that strict liability for cattle trespass should continue for damage to land and crops. The National Farmers' Union would keep the existing action and recommend that liability should cover damage or injury to other animals or chattels, as well as to crops or land. The Rural District Councils' Association wished to retain the action. It will thus be seen that those bodies in touch with the farming community wish to retain strict liability for cattle trespass.

63. We take the view that the retention of strict liability for cases of cattle trespass can only be justified if it provides a clear rule as to liability for trespassing cattle, enabling disputes to be settled normally without recourse to litigation. There can be little doubt however, that this part of the law is afflicted with archaic and doubtful rules, and rather than attempt to patch up parts of the present law relating to cattle trespass we think it preferable to provide a new statement of the principles of strict liability for straying livestock. We therefore recommend that the present law governing liability for cattle trespass be abolished and replaced by the following rules.

64. We think that in stating the new liability the common law term "cattle" which is somewhat doubtful in its scope should be abandoned and that the new

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form of strict liability should apply to "livestock", to be defined as meaning any animal of the bovine species, horses, asses, mules, hinnies, sheep, goats, pigs and poultry, and also deer not in the wild state. We also recommend that the straying of livestock should no longer be actionable *per se* without proof of actual damage. We think however that this latter concept should include reasonable expenses incurred in keeping the livestock under the right of detention which we propose should replace the present remedy of distress damage feasant[94] and reasonable expenses incurred in seeking the person to whom it belongs. In the development of the action of cattle trespass from an invasion of an interest in land to cover damage done to things not strictly forming part of the land it was understandable that reliance was put on the technical trespass to the land with other loss taken into account in estimating the damages.[95] But if the basis of strict liability for straying livestock today is to be that it facilitates the settlement of claims tending to arise mutually between farmers, the claims should in our view have a real rather than a nominal basis.

65. If the straying of livestock on to a person's land is not to be actionable *per se*, to what types of damage should the rule of strict liability be applied? We think that the damage covered should be limited to that suffered by land (including growing things and buildings) and chattels (including animals). The same simple rule of strict liability based upon the idea of give and take between farmers can hardly be applied to personal injuries. We have considered whether the property in question should be limited in view of our premise to land and chattels used in agriculture, but have reached the conclusion that this would raise problems of definition which would defeat our purpose of providing a relatively simple rule.

66. The requirement of a simple rule also makes it necessary that the occupier of the land strayed upon should in most cases be the only person able to claim on the basis of strict liability. We recognize however that in some cases such an unqualified rule could lead to undesirable results[96] and we therefore recommend that an owner of land who is not in occupation should be able to rely upon the rule of strict liability in so far as his interest in the land or in chattels on the land has suffered damage.

67. The nature of the defences available is one of the more obscure areas of the present law relating to cattle trespass and any new rule must seek to state the defences so as to be limited in nature and clear in effect, thereby minimizing the possibilities of dispute. We think that the only defences to a claim under the rule of strict liability for straying livestock should be:

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[94] See paragraph 71 below.

[95] See, for example, *Ellis* v. *Loftus Iron Co.* (n. [92] above) where the plaintiff recovered for damage done to his mare by the bites and kicks of the defendant's horse which had committed a technical trespass by intruding only a part of its body across the boundary.

[96] As where a cottage and garden is let by a farmer for a short term to a holidaymaker and straying livestock do damage during the course of the term. In such a case the occupier might have little interest in recovering damages and the farmer, if the rule of strict liability were limited to occupiers, would be thrown back upon proving negligence.

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(i) that the livestock strayed from a highway and its presence there was a lawful use of the highway.[97]

(ii) that the plaintiff by reason of his negligence was solely responsible for the damage, and the partial defence that the plaintiff by his negligence contributed to the damage. The plaintiff should not be regarded as responsible for or contributing to the damage by reason only of the fact that he could have prevented the straying of the livestock by fencing; but the keeper of the livestock should not be liable if the straying would not have taken place but for a breach by any other person, being a person having an interest in the land strayed upon, of a duty to fence.[98]

68. It may be possible under the present law to bring a claim in cattle trespass for the "depasturing of chattels" where there has been no unauthorized intrusion of the livestock upon land, as where chattels belonging to A are lawfully on B's land and are there damaged by B's cattle.[99] Our proposed abolition of cattle trespass will remove this possibility. We think that any new rule should require a "trespass" by the defendant's livestock upon the plaintiff's land and damage resulting therefrom.

D. DISTRESS DAMAGE FEASANT

69. The occupier of land may under the existing law detain trespassing cattle until compensated by their owner for the damage done.[100] But the remedy is

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[97] The principle of this defence was explained by Blackburn J. in *Fletcher* v. *Rylands* (1866) L.R. 1 Ex. 265 at p. 286 as a recognition by the law that those who have property adjacent to the highway must accept some inevitable risk, at least to the extent they cannot recover without proof of want of care or skill occasioning the damage. The defence has been recognized in a number of cases including *Tillett* v. *Ward* (1882) 10 Q.B.D. 17 and *Gayler & Pope Ltd.* v. *Davies* [1924] 2 K.B. 75. In so defining the defence we have had to make a choice between restricting the land concerned to that actually adjoining the highway, to land "substantially" adjoining the highway or to any land. As Professor Glanville Williams points out (*op. cit.* (n. [8] above) at p. 375), the first alternative would exclude the defence in respect of land separated by a narrow strip from the highway although clearly subject to its risks; the second would give rise to those problems of definition which, if the action of cattle trespass is to be retained at all, it would seem essential to minimize; the third alternative can be supported on the ground that if cattle do find their way from the highway to the plaintiff's land it is not unreasonable to assume as a matter of fact that the land is affected by the risks of the highway.

[98] The law relating to the obligation to fence and its effect upon the present liability for cattle trespass is exceedingly complex. See Professor Glanville Williams, *op. cit.* (n. [8] above), Ch. XII and XIII. We feel that it would be inappropriate within the topic in our First Programme here under consideration to deal with the problem of fencing in any way other than providing a relatively simple rule governing the effect of fencing obligations upon the rule of strict liability for straying livestock. The duty to fence raises many problems unconnected with animals and has to be considered in the light of the Report of the Committee on Positive Covenants Affecting Land, 1965 (Cmnd. 2719), the Fourteenth Report of the Law Reform Committee, (Acquisition of Easements and Profits by Prescription), 1966 (Cmnd. 3100) and our own Report on Restrictive Covenants, 1967 (Law Com. No. 11) under Item IX (Transfer of Land) in our First Programme. The difficulties of fact and law which may arise in an action of cattle trespass involving questions of the obligation to fence are strikingly illustrated by the decision of the Court of Appeal in *Jones* v. *Price* [1965] 2 Q.B. 618.

[99] See Professor Glanville Williams, *op. cit.* (n. [8] above) at pp. 152–7.

[100] This right, known as *distress damage feasant* is not limited to animals and the animals concerned are not limited to those in respect of which an action for cattle trespass may be brought. See Professor Glanville Williams, *op. cit.* (n. [8] above) at pp. 26–32. As far as distraining on inanimate chattels is concerned, we think that different considerations may apply and that a review should be made of the law in conjunction with the closely allied topics of the position of the involuntary bailee (see *Salmond on Torts*, 14th ed., p. 791, n. [15]), and the disposal by bailees of uncollected goods (see Disposal of Uncollected Goods Act 1952) in the light of our general observations in paragraph 25 of our Interim Report on Distress for Rent under Item VIII (Codification of the Law of Landlord and Tenant).

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hedged about with technicalities and gives the occupier no power of sale. It was described by the Goddard Committee as "almost obsolete".[101]

70. The Goddard Committee[102] recommended that distress damage feasant in its ancient form should be abolished, but that a modernized remedy should take its place. The Law Reform Committee for Scotland,[103] in discussing a somewhat similar right under the Winter Herding Act 1686, were also in favour of a modernized remedy on similar lines to that proposed by the Goddard Committee. Few of those we consulted expressed their views on this topic. The majority of those members of the Torts Sub-Committee of the Law Reform Committee of the Society of Public Teachers of Law who commented on the topic agreed with the Goddard Committee, as did the Country Landowners' Association and the Rural District Councils' Association. The Chartered Land Societies Committee agreed in principle with the proposals of the Goddard Committee with minor modifications, which was also the position of the National Farmers' Union.

71. We agree generally with the proposals of the Goddard Committee, but would extend or modify their proposals in some respects.

(i) The right of distress damage feasant should be abolished so far as it relates to animals.[104]

(ii) The occupier of land should have the right to seize livestock[105] which has strayed on to his land and which is not then in the control of any other person,[106] and to detain it.

(iii) The livestock whilst confined should be treated with reasonable care and supplied with sufficient food and water; the detainer should be liable in damages for failure to fulfil these duties.

(iv) The detainer should within forty-eight hours of exercising the right of detention give notice to the police and, if he knows the person to whom the livestock belongs, to that person.

(v) The right to detain the livestock should cease if:

(*a*) the detainer has not complied with the provisions regarding notice; or

(*b*) the detainer is tendered a sum of money sufficient to satisfy any claim he may have for damage and expenses in respect of the straying livestock;[107] or

(*c*) the detainer has no such claim for damage or expenses and the person to whom the livestock belongs claims it; or

(*d*) the detainer is ordered by a court to return the livestock.[108]

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[101] Paragraph 9 of their Report (see n. [1] above).
[102] Paragraph 9 of their Report (see n. [1] above).
[103] Paragraphs 13 and 14 of their Report (see n. [2] above).
[104] As we have pointed out (n. [100] above) the right applies to all animals, but with regard to animals other than livestock it can safely be said that it has fallen into complete desuetude.
[105] This term has the meaning which we assign to it in paragraph 64 above.
[106] This is part of the present law and seems necessary to avoid possible breaches of the peace where, for example, an attempt is being made to seize a horse which is being ridden.
[107] The recommendation of the Goddard Committee excluded damage from the sum to be tendered. It is not entirely clear whether this was deliberate, but if the aim is to provide a modern substitute for the old remedy it would seem desirable to include the damage caused.
[108] See R.S.C., O.29, r.6; C.C.R., O.13, r.9, which enable the court to order the return of property on payment into court of the sum against which they are held.

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(vi) Where the livestock has been rightfully detained for fourteen days or more the detainer should be entitled to sell it at a market or by public auction unless proceedings are pending for the return of the livestock or for any claim for damage done by it or expenses incurred in detaining it.

(vii) Where the net proceeds of sale exceed the amount of any claim the detainer may have for damage and expenses the excess should be recoverable from him by the person who would be entitled to the possession of the livestock but for the sale.[109]

72. Under the existing law the action for cattle trespass is barred to the distrainor as long as he is exercising his right of distress damage feasant. It revives if the animal dies or departs from his keeping without his fault or, it seems, if he hands it back to the owner. What happens if the animal dies or escapes owing to his negligence is obscure although it may be that the action for cattle trespass is lost.[110] We think these rules are unnecessarily rigid if applied to our proposed modernized remedies. A person who has suffered damage from straying livestock should be entitled to bring an action while he is exercising his right of detaining the animal, as well as after he has sold it; it would seem unreasonable to compel him to proceed to sale if, for example he knows that the damage caused far exceeds the value of the animal. Nor do we see any valid reason why the detainer's action should be lost if the animal under detention has died or escaped through his negligence; the owner of the animal would appear sufficiently protected by the right given to him under paragraph 71 (iii) above to counterclaim for a failure to take reasonable care.[111]

E. THE DOGS ACTS 1906 to 1928

73. The Dogs Acts 1906 to 1928 constitute a striking statutory exception to the general law regarding civil liability for damage done by animals, in that they impose a strict form of liability for injury to cattle and poultry done by dogs, although dogs of course are not classed by the law as dangerous, and do not necessarily have dangerous characteristics known to their owner. We recognize the force of the special considerations which led the legislature to impose this strict liability; these considerations are demonstrated by the statistics, cited below,[112] relating to attacks by dogs on livestock. We agree with the principle of the

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[109] The Goddard Committee recommended that the detainer should deduct his expenses of sale and detention and pay the surplus into court. The proceeds were then to be paid out to the person to whom the livestock belonged. In our view however a procedure for payment into court would be unnecessarily cumbersome, having regard to the comparatively small sums which would usually be involved. Furthermore, in recommending payment into court the Goddard Committee do not appear to have dealt with the situation—not infrequent, as our consultations reveal—which might arise if proceeds had been paid into court and the owner was not known. It has been pointed out to us that in some cases where the damage was considerable in relation to the value of the animal it might be to the advantage of the owner not to reveal his ownership of the animal.

[110] See Professor Glanville Williams, *op. cit.* (n. [8] above) at p. 195.

[111] We do not here discuss the special remedy of replevin, which may be brought in respect of goods wrongfully taken under an alleged right of distress, including distress damage feasant. This raises problems not confined to animals and falls to be considered in the context of distress as a whole. See our First Annual Report, 1966, paragraph 102, and paragraph 25 of our Interim Report on Distress for Rent under Item VIII of our First Programme. The topic of replevin is also connected with the other proprietary remedies in respect of chattels, detinue and trover, which are now being examined by the Law Reform Committee.

[112] See n. [130] below.

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recommendations of the Goddard Committee with regard to the persons liable under these Acts and deal with this matter below in connection with the general problem of who is to be liable for damage done by animals.[113] We also think that the opportunity should be taken to resolve some doubts concerning the available defences which now exist to a claim under the Acts.[114] In *Grange* v. *Silcock*[115] it was held by a Divisional Court that it was no defence that the animals (sheep) were trespassing at the time when they were attacked by the defendant's dog. It is, however, a defence to a criminal charge brought under the Dogs (Protection of Livestock) Act 1953 that, at the time when a dog injures livestock, the animals are "trespassing on the land in question and the dog is owned by, or in the charge of, the occupier of that land or a person authorized by him, except in a case where [the defendant] causes the dog to attack the livestock". Again, in the Irish case of *Campbell* v. *Wilkinson*[116] it was held that any contributory negligence would be a defence. It does not appear that the nature of the strict liability now imposed by the Dogs Acts 1906 to 1928 has in practice given rise to much difficulty, but we think that the opportunity should be taken to provide a clearer statement of the law. We would, therefore, recommend that the fact that the plaintiff, by reason of his negligence, was solely responsible for the injury and, to the extent that it contributed to the injury, his contributory negligence, should be defences to liability of this type. We would also provide that a defence similar to the above-cited defence to a charge under the Dogs (Protection of Livestock) Act 1953 should be available in a civil action for injury to livestock by a dog. These results would in our view be best achieved by the repeal of those sections of the Dogs Acts 1906 to 1928 which impose civil liability and the enactment of new provisions as set out in the Draft Bill in Appendix A.

F. THE PERSON LIABLE FOR DAMAGE OR INJURY INFLICTED BY ANIMALS

74. The Dogs Acts 1906 to 1928, which impose a strict form of liability[117] in respect of injury done by dogs to cattle and poultry, were the subject of a special recommendation by the Goddard Committee[118] with regard to the persons subject to this liability. Section 1 of the 1906 Act (which was amended in 1928 to cover poultry as well as cattle) imposed liability only on the owner; but a person in whose house or premises the dog was kept or permitted to remain at the time of the injury was to be presumed to be the owner of the dog unless he proved otherwise. The Goddard Committee recommended that in section 1 liability should be imposed on the owner or *keeper*; and that the provision whereby in the above circumstances a person was presumed to be the owner should be replaced by a provision that "a person shall be deemed to keep a dog if it is in his custody or possession or that of any infant member of his household".[119] The Dogs Acts 1906 to 1928 apply with minor modifications to Scotland, and the Law Reform Committee for Scotland in their Twelfth Report agreed with

[113] See paragraphs 74–80 below.
[114] See Professor Glanville Williams, *op. cit.* (n. [8] above), pp. 354–7.
[115] (1897) 77 L.T.340. The case was decided on a similar statute of 1865. It is criticized by Professor Glanville Williams (see n. [114] above).
[116] (1909) 43 I.L.T. 237. The case was decided on the 1906 Act.
[117] See paragraph 73 above.
[118] Paragraph 6 of their Report (see n. [1] above).
[119] Paragraph 15 of their Report (see n. [2] above).

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the recommendations of the Goddard Committee. Our consultations revealed no dissent from this proposal.

75. The question who is to be liable under the Dogs Acts 1906 to 1928 is however only one aspect of a wider problem. In considering the various types of liability for damage or injury done by animals we have throughout generally found it convenient to refer to the "keeper". Under the existing law the liability arising out of damage or injury by an animal belonging to a dangerous species or with known fierce propensities, as well as liability for cattle trespass, applies to the possessor of the animal[120] but the position of the owner out of possession is less clear. Liability for negligence does not of course rest solely upon the owner or possessor as such but is imposed upon the person who owes a duty of care in all the circumstances of the case; it is not therefore necessary or desirable to specify the persons who come under this type of liability. We propose however to set out the persons who we consider should be strictly liable for dangerous animals, for injury to livestock by dogs and for straying livestock.

76. A preliminary question arises in theory, although seldom in practice,[121] with regard to the person liable for damage caused by animals which, from the standpoint of the law of property, have ceased to be in the ownership of anyone on reverting to their wild state. The difficulties may be illustrated by the problem which would arise if a fox in captivity escaped, or was allowed to return to a wild state, and thereafter preyed upon poultry[122]. Of course there might be insuperable practical difficulty in proving that the particular fox had caused the damage; but in other cases this difficulty might be less serious, as where the animal which had escaped was an unusual one, such as a cheetah. In such a case technical rules of the law of property which may be applicable[123] to divest a person of ownership of an animal should not in our view necessarily protect him from liability for damage which it causes.

77. We therefore recommend that a person should be subject to strict liability for animals of a dangerous species or with dangerous characteristics known to him and to strict liability for injury by a dog to livestock, if he is the keeper—i.e., if he owns or possesses the animal. And if at any time an animal ceases to be owned or possessed by anyone, any person who immediately before that time owned or possessed it should bear the same responsibility until someone else becomes owner or possessor. For this purpose we think it clear that a person who takes into and retains in his possession an animal for the purpose of preventing it causing damage or returning it to its owner should not be regarded as a keeper.[124] It should of course be remembered that we are here speaking

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[120] The old writ applicable to animals *feræ naturæ* and to animals *mansuetæ naturæ* with known fierce propensities alleged merely that the defendant *scienter retinuit* the animal. See Professor Glanville Williams, *op. cit.* (n. [8] above), p. 324. As to cattle trespass see *Dawtry* v. *Huggins* (1635) Clayt. 32; *Broderick* v. *Forbes* (1912) 5 D.L.R. 508 (Nova Scotia).

[121] The questions raised in this paragraph, and the limited amount of judicial authority and academic writing bearing on them are discussed by Professor Glanville Williams, *op. cit.* (n. [8] above), pp. 336–9.

[122] A possibility discussed by Twisden J. in *Mitchil* v. *Alestree* (1676) 1 Vent. 295.

[123] Though not necessarily appropriate, so far as they would suggest that an easily identifiable wild animal such as a lion ceases to be in the ownership of the person who had kept it in captivity in this country once it has escaped from, and has no intention of returning to, captivity.

[124] No doubt if such a person were regarded as a keeper he might have some right of recourse against the owner of the animal under the contribution provisions of the Law Reform (Married Women and Tortfeasors) Act 1935. This, however, would seem a strange and cumbersome way of imposing liability upon the real creator of the risk.

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only of our proposals for strict liability: we would not suggest that the "rescuer" should be absolved from his duty to take reasonable care.

78. We agree with the Goddard Committee that it is necessary to make the head of a household responsible for animals belonging to its younger members; were the law otherwise the strict liability[125] which we are proposing might be very easily evaded by transferring the property in, or the possession of, an animal to a young child. We therefore recommend that the head of a household should bear the same responsibility for an animal in the ownership or possession of a member of his household under the age of sixteen[126] as if the head of the household were himself the owner or possessor.

79. Our proposal for strict liability for animals with known dangerous characteristics (paragraph 18 above) requires that the person sought to be held liable should know of those characteristics. In certain circumstances, however, the present law imputes this knowledge to the keeper of an animal.[127] The only cases of imputed knowledge properly so-called seem to arise where a servant who has general charge of his master's animal acquires knowledge of its vicious propensities.[128] We would preserve the principle and provide in addition that the knowledge of a member of a household under the age of sixteen who is a keeper of the animal should be imputed to the head of the household. Of course it may be that even where knowledge cannot be imputed in law the court may infer the knowledge of the defendant from the fact that someone close to him knew of the dangerous characteristics.[129]

80. The strict liability which we propose for damage done by straying livestock raises rather different considerations. If this rule of strict liability is to provide a simple rule for the settlement of disputes between neighbours we think that the owner of livestock out of possession has no place in the scheme of liability. We recommend that in these cases the only person to be held liable should be the possessor of the livestock.

G. THE PROTECTION OF LIVESTOCK AGAINST DOGS

81. We have so far been concerned with injury or damage caused by animals. We turn finally to questions arising from injury to animals inflicted in protection of other animals. The most important practical field in which this problem occurs, and the aspect of the matter specifically dealt with by the Goddard Committee,

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[125] Again it seems unnecessary to make specific recommendations as to liability for negligence, for the law imposes in certain circumstances upon a parent the duty to supervise his child's activities. See *Newton* v. *Edgerley* [1959] 1 W.L.R. 1031 and *Gorley* v. *Codd* [1966] 3 All E.R. 891.

[126] The Goddard Committee in their recommendation on liability under the Dogs Acts chose the age of twenty-one, but in view of the changed conditions reflected in the Report of the Committee on the Age of Majority, 1967 (Cmnd. 3342), sixteen seems perhaps more suitable.

[127] See Professor Glanville Williams, *op. cit.* (n. [8] above), pp. 306–8.

[128] *Stiles* v. *Cardiff Steam Navigation Co.* (1864) 33 L.J. Q.B. 310. Cf. *Colget* v. *Norris* (1886) 2 T.L.R. 414 and 2 T.L.R. 471 in the Court of Appeal.

[129] As in *Gladman* v. *Johnson* (1867) 36 L.J. C.P. 153, where, upon evidence that the defendant's wife knew of the fierce propensities of the defendant's dog, the finding of the jury that the defendant knew of them was upheld.

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concerns the shooting of dogs which are worrying farm animals.[130] The law allows an owner of animals to shoot a dog if the dog is actually attacking the animals, or likely to renew an attack so that the animals are in real and imminent danger. Chasing by dogs which causes any real and present danger of serious harm to the animals chased constitutes an attack. There must however either be no other practical means open to the owner of stopping the attack or preventing a renewal of the attack, or he must have acted reasonably in regarding the shooting as necessary for the protection of the animals, having regard to all the circumstances.[131]

82. The Goddard Committee[132] recommended that when a farmer or other occupier (or an employee of a farmer or occupier) sees a dog trespassing on the land of the farmer or other occupier and shoots it, it should be a defence to an action brought in respect of the shooting to prove (*a*) that the dog when shot

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[130] The National Farmers' Union have supplied us with figures relating to attacks by dogs on farm animals which have been collected by the Ministry of Agriculture and Fisheries. We take those relating to the years 1961–66 inclusive.

WORRYING OF SHEEP BY DOGS IN ENGLAND AND WALES

	Total Killed	*Total Injured*	*Total Killed and Injured*
1961 . . .	3,940	4,315	8,255
1962 . . .	4,545	4,783	9,328
1963 . . .	5,073	5,270	10,343
1964 . . .	4,319	4,049	8,368
1965 . . .	4,572	4,962	9,534
1966 . . .	4,398	4,672	9,070

WORRYING OF POULTRY BY DOGS IN ENGLAND AND WALES

1961 . . .	13,238	2,461	15,699
1962 . . .	10,668	3,232	13,900
1963 . . .	11,612	2,414	14,026
1964 . . .	7,715	1,790	9,505
1965 . . .	7,881	1,419	9,300
1966 . . .	7,570	1,362	8,932

We have also been supplied by the police authorities with some local statistics covering particular areas:

CARMARTHEN AND CARDIGAN

	Sheep		*Poultry*			
	Cases Reported	*Sheep Killed or Injured*	*Cases Reported*	*Poultry Killed or Injured*	*Dogs Traced Sheep*	*Dogs Traced Poultry*
1961–65 . .	575	2,023	23	299	205	18

CORNWALL

	Number of Cases of Livestock Worrying Reported	*Livestock Killed or Injured*	*Dogs Traced*
1961–66	705	1,911	450

DEVON AND EXETER POLICE AREA

	Sheep		*Poultry*	
	Killed	*Injured*	*Killed*	*Injured*
1961–66 . .	896	947	868	101

AREA OF HAMPSHIRE AND ISLE OF WIGHT CONSTABULARY

	Sheep Killed or Injured	*Poultry Killed or Injured*	*Cattle Killed or Injured*
1961–66	264	1,199	21

[131] These propositions were laid down in *Cresswell* v. *Sirl* [1948] 1 K.B. 241 at p. 249.

[132] Paragraph 7 of their Report (n. [1] above).

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was committing a trespass on land in the occupation of the defendant or his employer and (*b*) that he reasonably believed that cattle or poultry on that land had been or would be injured by reason of that trespass and (*c*) that within 48 hours after the dog was shot he gave notice of the shooting to the police officer in charge of the police station nearest to the place where it occurred. The Committee added that a person should be deemed to be in occupation of land for this purpose if cattle or poultry owned by him are on the land on which he has the permission of the actual occupier to put them. These provisions were to be without prejudice to any other defence available to the defendant. In a note to the Report Professor Glanville Williams thought it was an undue restriction of the liberty to shoot that the dog must be shot when committing a trespass on the farmer's land, as, where the offending dog had escaped over the boundary into the land of a neighbouring farmer. The Law Reform Committee for Scotland[133] agreed to some extent with Professor Glanville Williams, suggesting that the defence proposed by the Goddard Committee should be available, and that the dog might be shot when escaping from, and not only actually on, land in the occupation of the defendant or his employer. Among practitioners only one solicitor has expressed a view ou this subject; he takes the view that the present law goes sufficiently far in defence of a person shooting dogs. The Torts Sub-Committee of the Law Reform Committee of the Society of Public Teachers of Law did not express any collective view, and individual comments were varied; some would accept the recommendations of the Goddard Committee; another view is that the whole question should be left to be decided in accordance with the general principles governing the defence of necessity, without specific limitations as to where the shooting takes place; a further view is that the present law is satisfactory. Among others consulted, the Chartered Land Societies Committee favoured the proposals of the Goddard Committee with Professor Glanville Williams's extension, but suggested that the right to shoot a dog on neighbouring land should apply only where that land was open agricultural land without buildings. The National Farmers' Union urge the acceptance of the Goddard Committee's proposals as modified by Professor Glanville Williams; however they would be prepared to exclude from the circumstances justifying shooting a case where, for example, a dog had attacked sheep had been called off by its master and had obeyed the call. They would also like the principles applicable to dogs to be applied to attacks made by other animals on property.[134] The Rural District Councils' Association agreed with the recommendations of the Goddard Committee.

83. Since the Goddard Committee Report the Dogs Act (Northern Ireland) 1960[135] has provided a defence to an action or a charge arising out of the shooting of a dog if the defendant proves (*a*) that the dog was shot while attacking, chasing or otherwise worrying or while making off after attacking, chasing or worrying any livestock (which includes cattle and poultry) or (*b*) that, after the attacking, chasing or worrying, the dog was shot in the reasonable

[133] In their Twelfth Report, paragraph 16 (n. [2] above).

[134] See e.g., *Hamps* v. *Darby* [1948] 2 All E.R. 474 where *Cresswell* v. *Sirl* (see n. [131] above) was applied to a case where a farmer had shot homing pigeons which were feeding on his growing peas.

[135] This repealed and re-enacted with amendments the Dogs Act (Northern Ireland) 1927. The Goddard Committee in their recommendations stated that they were following the substance of the Northern Ireland Act of 1927, but the Act of 1927 only provided a defence if the dog was shot "when chasing or worrying" in fact, and not when it was reasonably believed to be chasing or worrying.

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belief that the particular dog had done the attacking, chasing or worrying and that the shooting took place on land whereon the livestock were kept or depastured or on any land (including a highway or public path) contiguous thereto. In other respects, regarding the persons who may raise the defence and notification to the police, the Northern Ireland Act is very similar to the recommendations of the Goddard Committee, but it will be noted that the Goddard Committee's proposals, unlike the Act, would extend to an imminent and not merely an actual attack and that the majority of the Goddard Committee would require the shooting to have taken place on the land where the animals were.

84. We recognize the serious nature of the problem presented by dogs which injure or kill farm animals, as indicated by such statistics as we have been able to obtain.[136] The propositions, laid down in *Cresswell* v. *Sirl*[137] in relation to a civil action concerning attacks of dogs on livestock and in *Hamps* v. *Darby* in relation to a civil action concerning the depredations of homing pigeons on crops, give concrete expression to general principles of the common law governing the infliction of otherwise unlawful damage in defence of property.[138] The question is whether these principles, which in certain circumstances permit measures to prevent the risk of damage to property, or to mitigate such damage, at a time of actual or imminent danger, are not sufficiently wide to deal with the special problem of dogs killing or injuring livestock. The problem facing the farmer is twofold: first, the civil remedies given by the Dogs Acts 1906 to 1928[140] and the criminal penalties imposed by the Dogs (Protection of Livestock) Act 1953[141] depend on finding the person responsible for the dog, which may be difficult or impossible; secondly, and in view of the first consideration, the farmer wants to make sure that a dog which he reasonably believes to be a present or future menace to his property and that of his neighbours will be destroyed. The Goddard Committee recognize the farmer's point of view to the extent that they would not require the farmer to prove that an attack had actually begun or was in imminent danger of renewal; it would be sufficient if he reasonably believed that his animals would be injured or had been injured by that animal, provided that, as required by the majority, he shot it on his land. The Dogs Act (Northern Ireland) 1960 also goes beyond the common law but only to the extent of permitting the shooting after the attack has in fact taken place, even when there is no likelihood of renewal, if the farmer reasonably believes that the dog he shoots has committed the attack. It will have been noted that those whom we consulted who favoured some change in the common law rules would also permit in certain circumstances shooting to prevent damage on a future occasion, in addition to shooting as a preventive measure against a danger which is real and imminent at the time when the shooting takes place.

85. We think that in considering the civil law consequences[142] of shooting dogs regard must be had not only to the interests of the owners of livestock

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[136] See n. [130] above.
[137] See n. [131] above.
[138] See *Salmond on Torts*, 14th ed., 1965, pp. 45–46.
[140] See paragraph 73 above.
[141] See paragraph 73 above.
[142] It should be noted that the Goddard Committee regarded the question of the appropriate defence to a criminal charge in those circumstances as outside their terms of reference (see paragraph 7 of their Report, n. [1] above). In our opinion it would be inadvisable to deal with criminal charges, where different considerations may apply, in the context of this Report, and the matter would be better considered as part of a general review of the law relating to malicious damage.

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on the one hand and on the other hand to the interests of the owners of dogs, but also to the dangers inherent in the use of firearms. Bearing these considerations in mind, our conclusion with regard to this branch of the law is that the emphasis which the existing law puts on the necessity of any measures taken against animals in purported defence of property being related to an existing or imminent danger is in principle sound. It would in our view be unwise generally to sanction the killing of animals merely because, having done damage, they may on a future occasion cause further damage. However, we recognize that the worrying of livestock by dogs raises special problems, which are not entirely solved by the propositions laid down in *Cresswell* v. *Sirl*.[143] Those propositions are in our view inadequate in two respects to deal with the special case of dogs worrying livestock. First, they require that the measures directed against the dog[144] should be taken during an actual attack or when there was likelihood of the imminent renewal of an attack which had already taken place. Secondly, they allow no right to shoot or take other measures involving injury to the dog, where an attack has taken place and the attacking animal is escaping; they thus make no allowance for the well-known fact that dogs which have worried livestock are likely to do so again or for the practical difficulties of tracing their owners. We would therefore agree in principle with the recommendations of the majority of the Goddard Committee, but we would formulate and modify those recommendations as set out in the succeeding paragraphs.

86. We recommend therefore that, without prejudice to any other defence, it should be a defence to any action brought to recover damages in respect of the killing or injuring of a dog for the defendant to prove that:

(i) The dog was, or he reasonably believed that it was, worrying or about to worry livestock,[145]

(ii) *either* the livestock were in his ownership or possession or in the ownership or possession of a person whose express or implied authority he had to protect the livestock,
or the livestock were on land in his occupation or in the occupation of a person whose express or implied authority he had to protect the livestock,

(iii) there were, or he reasonably believed that there were, no other reasonable means of preventing or bringing to and end the worrying, and

(iv) within 48 hours of the infliction of the injury he gave notice of the incident to the police.

87. It will be seen that we agree with Professor Glanville Williams's note to the Report of the Goddard Committee[146] to the extent that we would not limit the right to deal with dogs to those which are trespassing, provided that there is reasonable belief in the imminence or existence of an attack. However, we think it desirable to ensure that the measures taken against the dog correspond with

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[143] See n. [131] above.

[144] In *Cresswell* v. *Sirl* the facts concerned the shooting of a dog and it was perhaps natural for the Goddard Committee to speak only in terms of shooting. However, the Dogs Act (Northern Ireland) 1960 seems unnecessarily limited in dealing only with the shooting of dogs. What are being discussed are the circumstances in which measures taken against a dog, which would normally give cause for a civil action, may be excused.

[145] For this purpose we would define "livestock" in the same way, as in section 3 of the Dogs (Protection of Livestock) Act 1953. This Act is concerned only with criminal penalties imposed on the owner or keeper of dogs attacking livestock.

[146] See paragraph 82 above.

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the reasonable necessities of the case; where, for example, a dog is accompanied a reasonably practicable way of bringing an attack to an end or of preventing an attack may in the first instance be to request the person accompanying it to call it off.

88. Rather different considerations should in our view govern the defence available where the damage has in fact, or is believed to have, taken place. Any defence given in such circumstances is a departure from what we regard as a sound general principle of the common law[147] and should accordingly be strictly limited. To deal with these circumstances we would therefore recommend that, without prejudice to any other defence, it should be a defence to any action brought to recover damages in respect of the killing or injuring of a dog for the defendant to prove that:

(i) the dog had, or he reasonably believed that it had, worried livestock,

(ii) *either* the livestock were in his ownership or possession or in the ownership or possession of a person whose express or implied authority he had to protect the livestock,
or the livestock were on land in his occupation or in the occupation of a person whose express or implied authority he had to protect the livestock,

(iii) the dog was, or he reasonably believed that it was, not under the control of any person,

(iv) there were no practicable means, or he reasonably believed that there were no such means, of ascertaining the owner or keeper of the dog,

(v) the injury inflicted on the dog took place while the dog remained in the vicinity of the worrying or reasonably supposed worrying or was making off thereafter,

(vi) within 48 hours of the infliction of the injury on the dog he gave notice of the incident to the police.

89. As compared with the recommendations of the majority of the Goddard Committee, we would thus not impose on the right to inflict injury on a dog escaping after worrying livestock a limitation which would restrict that right to the actual land on which the worrying took place or was reasonably supposed to have taken place. Apart from the consideration that the person inflicting the injury, if he does not happen to be the occupier of the land, may not necessarily know its precise boundaries, we think it would in some cases be somewhat unrealistic to limit the right, by reference to rights of occupation over particular pieces of land. On the other hand it will be observed that we would qualify the recommendations of the Goddard Committee to ensure that in those circumstances the right is only exercised when there were no reasonable means, or it was reasonably thought that there were no such means, of ascertaining the owner or keeper of the dog. We would also limit the right to inflict injury on the dog to a period immediately following the worrying or reasonably supposed worrying of the livestock.

90. We should emphasize that the rights to inflict injury on dogs recommended in paragraphs 86 and 88 above would provide defences only in respect of civil actions in respect of injury to a dog. They would not affect the position at

[147] See paragraph 85 above.

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common law or by statute or local Act where, for example, a third party injured by a shot fired at a dog brought an action of negligence against the person firing the shot, or where shooting on the highway created a nuisance or was forbidden by local Act.

H. SUMMARY OF PROPOSALS

91 (i) Strict liability at common law for animals *feræ naturæ* and for animals with known fierce propensities should be abolished. (Paragraphs 14 and 15, 17 and 18).

(ii) Strict liability should be imposed in respect of any injury or damage done by animals belonging to a species which presents a special danger to persons or property. A species presents a special danger when animals belonging to it are likely to cause damage or any damage which they may cause is likely to be severe. (Paragraphs 15 and 16.)

(iii) The question whether an animal belongs to such a species should depend as at present on a test prescribed by law; in determining this question a court should regard as the decisive consideration the risk to persons or property in the circumstances of this country. A species of animals which is generally domesticated in the British Isles should not be regarded in law as dangerous, but with regard to other species their domesticated or non-domesticated character abroad should be taken into account only to the extent that this factor may be relevant to the degree of risk which such species present in the circumstances of this country. (Paragraph 15.)

(iv) Strict liability should also be imposed in respect of injury or damage of any kind done by an animal which does not belong to a dangerous species, if the particular animal had dangerous characteristics known to its keeper which made it likely that injury or damage of that kind would occur or that any injury or damage of that kind which might occur would be severe. Such characteristics should be capable of giving rise to strict liability even if they are shared by other animals within the species, whether at a particular age, at certain times of the year or in certain conditions. (Paragraphs 17 and 18.)

(v) Strict liability in respect of either of the two above categories should not depend on escape from control. (Paragraph 19.)

(vi) The fact that the plaintiff by reason of his negligence was solely responsible for the injury or damage, his voluntary assumption of the risk, and, to the extent that it contributed to the injury or damage, contributory negligence should be defences. But liability should not be restricted between employer and employee on the ground of voluntary assumption of risk. It should also be a defence that the plaintiff was at the time of the injury or damage a trespasser on the property where the animal was kept and, where the animal does not belong to a dangerous species, it was not kept there to cause damage to trespassers and, where the animal belongs to a dangerous species, it was not kept there to deter or cause damage to trespassers. (Paragraphs 20–24.)

92 (i) The general principles of the present law of negligence whereby the keeper of an animal is under a duty to prevent that animal causing injury or damage should not be disturbed. (Paragraphs 26–28.)

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(ii) The exception to this principle recognized by the House of Lords in *Searle* v. *Wallbank* should be abolished, but in deciding whether the keeper of an animal has exercised reasonable care to prevent the animal causing damage by escaping on to the highway, regard should be had to a number of special considerations. (Paragraphs 29–57.)

(iii) Notwithstanding (ii) above a person should not be regarded as committing a breach of the duty to take care by reason only of placing animals on any common land (within the meaning of the Commons Registration Act 1965) in any case where it is lawful for him to do so. (Paragraph 44.)

93 (i) The present rules of strict liability for cattle trespass should be abolished, and a new form of strict liability for straying livestock should be provided. (Paragraphs 60–68.)

(ii) The straying of livestock should only be actionable upon proof of actual damage; this should cover reasonable expenses incurred in detaining the livestock where there is a right to do so or in finding the person to whom it belongs, but should otherwise be limited to damage to land and chattels. (Paragraphs 64–65.)

(iii) Normally the occupier of the land strayed upon should be the only person able to rely upon this rule of strict liability. However, an owner of land out of possession whose interest in the land or in chattels thereon is damaged should also be able to do so. (Paragraph 66.)

(iv) The following should be defences to a claim under this rule of strict liability:

(*a*) The fact that the plaintiff by reason of his negligence was wholly responsible for the damage and, to the extent that it contributed to the damage, the partial defence of his contributory negligence. But neither of these defences should be available by reason only that the plaintiff could have prevented the straying by fencing, unless the straying would not have occurred but for the breach of a duty to fence by a person other than the defendant having an interest in the land upon which the livestock strayed.

(*b*) The fact that the livestock had strayed from a highway where it lawfully was. (Paragraph 67.)

94 (i) The right of distress damage feasant in respect of animals should be abolished. In its place there should be provided a new remedy whereby a person finding livestock which has strayed on to land in his occupation may detain it as security against payment of compensation for the damage which he has suffered and certain reasonable expenses. (Paragraphs 69–72.)

(ii) The new remedy should be on the lines suggested by the Goddard Committee but should be elaborated, modified and extended in certain respects, in particular to give a power of sale to the detainer to cover not only the cost of detaining the animal but also the damage which it has caused. (Paragraph 71.)

95. The strict liability at present imposed by the Dogs Acts 1906 to 1928 for injury by dogs to cattle or poultry should be retained but the principles of this liability should be restated in new legislative provisions. The fact that the

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plaintiff was by reason of his negligence the sole cause of the injury and, to the extent that it contributed to the injury, his contributory negligence, should be defences to an action brought under this form of strict liability. It should also be a defence that the livestock were straying on the land where they were attacked by the dog and the dog belonged to the occupier of the land or its presence there was authorized by him. (Paragraph 73.)

96. Strict liability for injury or damage caused by animals should be imposed upon the following persons:

(i) In the case of an action brought to enforce strict liability for animals of a dangerous species or with known dangerous characteristics, as well as for injury by dogs to livestock, the "keeper"—i.e., the owner or possessor of the animal—and a person a member of whose household under the age of sixteen is a keeper. If at any time the animal ceases to have a keeper a person who immediately before that time was a keeper should continue to bear responsibility for the animal until some other person becomes the keeper. But a person who takes in an animal to prevent it causing damage or to restore it to its owner should not be regarded as a keeper for this purpose. (Paragraphs 77 and 78.)

(ii) In the case of an action brought to enforce strict liability for straying livestock, the possessor of the livestock. (Paragraph 80.)

97. Knowledge of dangerous characteristics of an animal should be imputed to a person in the following cases:

(i) Where a servant of his who has charge of the animal knows of its dangerous characteristics.

(ii) Where a member of his household under the age of sixteen who is a keeper of the animal knows of its dangerous characteristics. (Paragraph 79)

98.(i) With regard to measures taken in protection of livestock against dogs, the defence to a civil action arising out of injury to a dog which was recognized in *Cresswell* v. *Sirl* should be extended to cover reasonable belief in the existence or imminence of an attack on livestock by a dog. (Paragraph 86)

(ii) It should also be a defence to such an action, subject to certain specific safeguards, that the defendant injured the dog after it had, or he reasonably thought that it had, worried livestock. Among the safeguards in particular should be the requirements that the dog was not in the control of any person, and that there were no practicable means, or the defendant reasonably believed that there were no practicable means, of ascertaining to whom the dog belonged. (Paragraph 87)

(*Signed*) LESLIE SCARMAN, *Chairman.*
L. C. B. GOWER.
NEIL LAWSON.
NORMAN S. MARSH.
ANDREW MARTIN.

HUME BOGGIS-ROLFE, *Secretary.*
24th October 1967.

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APPENDIX A

DRAFT OF
ANIMALS (CIVIL LIABILITY) BILL

ARRANGEMENT OF CLAUSES

Strict liability for damage done by animals

Clause

1. New provisions as to strict liability for damage done by animals.
2. Liability for damage done by dangerous animals.
3. Liability for injury done by dogs to livestock.
4. Liability for damage and expenses due to trespassing livestock.
5. Exceptions from liability under sections 2 to 4.
6. Interpretation of certain expressions used in sections 2 to 5.

Detention and sale of trespassing livestock

7. Detention and sale of trespassing livestock.

Animals straying on to highway

8. Duty to take care to prevent damage from animals straying on to the highway.

Protection of livestock against dogs

9. Killing of or injury to dogs worrying livestock.

Supplemental

10. Application of certain enactments to liability under sections 2 to 4.
11. General interpretation.
12. Short title, repeal, commencement and extent.

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DRAFT OF A BILL TO

Make provision with respect to civil liability for damage done by animals and with respect to the protection of livestock from dogs; and for purposes connected with those matters.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Strict liability for damage done by animals

New provisions as to strict liability for damage done by animals.

1.—(1) The provisions of sections 2 to 5 of this Act replace—

(*a*) the rules of the common law imposing a strict liability in tort for damage done by an animal on the ground that the animal is regarded as *feræ naturæ* or that its vicious or mischievous propensities are known or presumed to be known;

(*b*) subsections (1) and (2) of section 1 of the Dogs Act 1906 as amended by the Dogs (Amendment) Act 1928 (injury to cattle or poultry); and

(*c*) the rules of the common law imposing a liability for cattle trespass.

(2) Expressions used in those sections shall be interpreted in accordance with the provisions of section 6 (as well as those of section 11) of this Act.

Liability for damage done by dangerous animals.

2.—(1) Where any damage is caused by an animal which belongs to a dangerous species, any person who is a keeper of the animal is liable for the damage, except as otherwise provided by this Act.

(2) Where damage of any kind is caused by an animal which does not belong to a dangerous species, and—

(*a*) the animal has such characteristics that it is likely, unless restrained, to cause damage of that kind or that any damage of that kind that it may cause is likely to be severe; and

(*b*) those characteristics are known or treated as known to a person who is a keeper of the animal;

that person is liable for the damage, except as otherwise provided by this Act.

Liability for injury done by dogs to livestock.

3. Where a dog causes damage by injuring livestock, any person who is a keeper of the dog is liable for the damage, except as otherwise provided by this Act.

Liability for damage and expenses due to trespassing livestock.

4.—(1) Where livestock belonging to any person strays on to land in the ownership or occupation of another and—

(*a*) damage is done by the livestock to the land or to any property on it which is in the ownership or possession of the other person; or

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(*b*) any expenses are reasonably incurred by that other person in keeping the livestock while it cannot be restored to the person to whom it belongs or while it is detained in pursuance of section 7 of this Act, or in ascertaining to whom it belongs;

the person to whom the livestock belongs is liable for the damage or expenses, except as otherwise provided by this Act.

(2) For the purposes of this section any livestock belongs to the person in whose possession it is.

Exceptions from liability under sections 2 to 4.

5.—(1) A person is not liable under sections 2 to 4 of this Act for any damage which is due wholly to the fault of the person suffering it.

(2) A person is not liable under section 2 of this Act for any damage suffered by a person who has voluntarily accepted the risk thereof; but a person who accepts a risk incidental to his employment shall not be treated as accepting it voluntarily.

(3) A person is not liable under section 2 of this Act for any damage caused by an animal kept on any premises or structure to a person trespassing there, if it is proved—

(*a*) where the animal belongs to a dangerous species, that it was not kept there to deter or cause damage to trespassers;

(*b*) where the animal does not belong to a dangerous species, that it was not kept there to cause damage to trespassers.

(4) A person is not liable under section 3 of this Act for any injury caused to livestock straying on to any land by a dog which belonged to the occupier or whose presence there was authorized by the occupier.

(5) A person is not liable under section 4 of this Act where the livestock strayed from a highway and its presence there was a lawful use of the highway.

(6) In determining whether any liability for damage under section 4 of this Act is excluded by subsection (1) of this section the damage shall not be treated as due to the fault of the person suffering it by reason only that he could have prevented it by fencing; but a person is not liable under that section where it is proved that the straying of the livestock on to the land would not have occurred but for a breach by any other person, being a person having an interest in the land, of a duty to fence.

Interpretation of certain expressions used in sections 2 to 5.

6.—(1) The following provisions apply to the interpretation of sections 2 to 5 of this Act.

(2) A dangerous species is a species—

(*a*) which is not generally domesticated in the British Islands; and

(*b*) whose fully grown animals normally have such characteristics that they are likely, unless restrained, to cause damage or that any damage they may cause is likely to be severe.

(3) Subject to subsection (4) of this section, a person is a keeper of an animal if—

(*a*) he owns the animal or has it in his possession; or

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(*b*) a member of his household under the age of sixteen owns the animal or has it in his possession;

and if at any time an animal ceases to be owned by or to be in the possession of a person, any person who immediately before that time was a keeper thereof by virtue of the preceding provisions of this subsection continues to be a keeper of the animal until another person becomes a keeper thereof by virtue of those provisions.

(4) Where an animal is taken into and kept in possession for the purpose of preventing it from causing damage or of restoring it to its owner, a person is not a keeper of it by virtue only of that possession.

(5) An animal's characteristics are treated as known to a keeper thereof if—

(*a*) they are known to another keeper thereof who is a member of his household and under the age of sixteen; or

(*b*) they are known to a person who has charge of the animal as his servant or were at any time known to a person who then had charge of the animal as his servant.

Detention and sale of trespassing livestock

Detention and sale of trespassing livestock.

7.—(1) The right to seize and detain any animal by way of distress damage feasant is hereby abolished.

(2) Where any livestock strays on to any land and is not then under the control of any person the occupier of the land may detain it, subject to subsection (3) of this section, unless ordered to return it by a court.

(3) Where any livestock is detained in pursuance of this section the right to detain it ceases—

(*a*) at the end of a period of forty-eight hours, unless within that period notice of the detention has been given to the officer in charge of a police station and also, if the person detaining the livestock knows to whom it belongs, to that person; or

(*b*) when such amount is tendered to the person detaining the livestock as is sufficient to satisfy any claim he may have under section 4 of this Act in respect of the livestock; or

(*c*) if he has no such claim, when the livestock is claimed by a person entitled to its possession.

(4) Where livestock has been detained in pursuance of this section for a period of not less than fourteen days the person detaining it may sell it at a market or by public auction, unless proceedings are then pending for the return of the livestock or for any claim under section 4 of this Act in respect of it.

(5) Where any livestock is sold in the exercise of the right conferred by this section and the proceeds of the sale, less the costs thereof and any costs incurred in connection with it, exceed the amount of any claim under section 4 of this Act which the vendor had in respect of the livestock, the excess shall be recoverable from him by the person who would be entitled to the possession of the livestock but for the sale.

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(6) A person detaining any livestock in pursuance of this section is liable for any damage caused to it by a failure to treat it with reasonable care and supply it with adequate food and water while it is so detained.

(7) References in this section to a claim under section 4 of this Act in respect of any livestock do not include any claim under that section for damage done by or expenses incurred in respect of the livestock before the straying in connection with which it is detained under this section.

Animals straying on to highway

Duty to take care to prevent damage from animals straying on to the highway.

8.—(1) So much of the rules of the common law relating to liability for negligence as excludes or restricts the duty which a person might owe to others to take such care as is reasonable to see that damage is not caused by animals straying on to a highway is hereby abolished.

(2) The following matters shall be included among those to which regard must be had in determining whether any damage caused by animals straying from any land on to a highway was wholly or partly due to a breach of the duty to take care:—

(*a*) the nature of the land and its situation in relation to the highway;

(*b*) the use likely to be made of the highway at the time the damage was caused;

(*c*) the obstacles, if any, to be overcome by animals in straying from the land on to the highway;

(*d*) the extent to which users of the highway might be expected to be aware of and guard against the risks involved in the presence of animals on the highway;

(*e*) the seriousness of any such risk and the steps that would have been necessary to avoid or reduce it;

and a person shall not be regarded as committing a breach of the duty to take care by reason only of placing animals on any common land (within the meaning of the Commons Registration Act 1965) in any case where it is lawful for him to do so.

Protection of livestock against dogs

Killing of or injury to dogs worrying livestock.

9.—(1) In any civil proceedings against a person (in this section referred to as the defendant) for killing or causing injury to a dog it shall be a defence to prove—

(*a*) that the defendant acted for the protection of any livestock and was a person entitled to act for the protection of that livestock; and

(*b*) that within forty-eight hours of the killing or injury notice thereof was given by the defendant to the officer in charge of a police station.

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(2) For the purposes of this section a person is entitled to act for the protection of any livestock if, and only if, the livestock or the land on which it is belongs to him or to any person under whose express or implied authority he is acting.

(3) Subject to subsection (4) of this section, a person killing or causing injury to a dog shall be deemed for the purposes of this section to act for the protection of any livestock if, and only if, either—

(*a*) the dog is worrying or is about to worry livestock and there are no other reasonable means of ending or preventing the worrying; or

(*b*) the dog has been worrying livestock and is not under the control of any person and there are no practicable means of ascertaining to whom it belongs;

but shall be so deemed by virtue of paragraph (*b*) of this subsection only while the dog remains in the vicinity or is making off.

(4) For the purposes of this section the condition stated in either of the paragraphs of the preceding subsection shall be deemed to have been satisfied if the defendant believed that it was satisfied and had reasonable ground for that belief.

(5) For the purposes of this section—

(*a*) an animal belongs to any person if he owns it or has it in his possession; and

(*b*) land belongs to any person if he is the occupier thereof.

Supplemental

Application of certain enactments to liability under sections 2 to 4.

10. For the purposes of the Fatal Accidents Acts 1846 to 1959, the Law Reform (Contributory Negligence) Act 1945 and the Limitation Acts 1939 to 1963 any damage for which a person is liable under sections 2 to 4 of this Act shall be treated as due to his fault.

General interpretation.

11. In this Act—

"damage" includes the death of, or injury to, any person (including any disease and any impairment of physical or mental condition);

"fault" has the same meaning as in the Law Reform (Contributory Negligence) Act 1945;

"livestock" means any animal of the bovine species, horses, asses, mules, hinnies, sheep, pigs, goats and poultry, and also deer not in the wild state;

"poultry" means domestic fowls, turkeys, geese, ducks, guinea-fowls and pigeons; and

"species" includes sub-species and variety.

Short title, repeal, commencement and extent.

12.—(1) This Act may be cited as the Animals (Civil Liability) Act 1967.

(2) The following are hereby repealed, that is to say—

(*a*) in the Dogs Act 1906, subsections (1) to (3) of section 1; and

(*b*) in section 1(1) of the Dogs (Amendment) Act 1928 the words "in both places where that word occurs".

(3) This Act shall come into operation on 1st January 1969.

(4) This Act does not extend to Scotland or to Northern Ireland.

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APPENDIX B

Organisations Consulted

Apart from consulting the Government Departments concerned, the members of the Bar and solicitors to whom we were referred by the Bar Council and The Law Society respectively and the Torts Sub-Committee of the Law Reform Committee of the Society of Public Teachers of Law, we have consulted the following non-legal organizations:—

The Association of Municipal Corporations.

The British Insurance Association.

The Chartered Land Societies' Committee of the Royal Institution of Chartered Surveyors, the Chartered Land Agents' Society and the Chartered Auctioneers' and Estate Agents' Institute.

The County Councils Association. (Paper on behalf of the Association by the Society of Clerks of the Peace of Counties and Clerks of County Councils).

The Country Landowners' Association.

The Cyclists' Touring Club.

The Federation of Zoological Gardens of Great Britain and Ireland.

The Joint Standing Committee of the Automobile Association, the Royal Automobile Club and the Royal Scottish Automobile Club.

The Kennel Club.

The National Farmers' Union.

The National Farmers' Union Mutual Insurance Society.

The National Union of Agricultural Workers.

The Royal Society for the Prevention of Accidents.

The Royal Society for the Prevention of Cruelty to Animals.

The Rural District Councils' Association.

The Trades Union Congress.

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